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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 527

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

vs.

THE WARREN COMPANY, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 7, 1955

CERTIORARI GRANTED MARCH 7, 1955

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 522

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

vs.

THE WARREN COMPANY, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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respondent, its officers, agents, successors and assigns. In pertinent part, said decree provides as follows:

> ORDERED ADJUDGED AND DECREED that the Respondent, The Warren Company, Incorporated, Atlanta, Georgia, its officers, agents, successors and assigns shall:
>
> 1. Cease and desist from:
>
> . . . . . .
>
> (b) Refusing to bargain collectively with District Lodge No. 46, International Association of Machinists, as the exclusive bargaining representative of all its tool and die makers, machinists, die setters, helpers, and apprentices, excluding clerical employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act;
>
> 2. Take the following affirmative action which the Board has found will effectuate the policies of the National Labor Relations Act;
>
> . . . . . .
>
> (d) Upon request, bargain collectively with District Lodge No. 46, International Association of Machinists, as the exclusive representative of the above-mentioned employees and, if an understanding is reached, embody such understanding in a signed agreement;
>
> . . . . . .
>
> (f) Post at its plant and office in Atlanta, Georgia, copies of the notice attached hereto and marked "Appendix A." Copies of said notice, to be furnished by the Regional Director of the National Labor Relations Board for the Tenth Region (Atlanta, Georgia), shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by other material;
>
> . . . . . .

II. The said decree has been in full force and effort since its entry and, at all times material herein, respondent has had full knowledge of its terms.

12 III. At all times since the entry of the said decree of this Court, respondent has failed and refused, and continues to fail and refuse, to comply with paragraphs 1 (b) and 2 (d) of said decree in that, although repeatedly requested by District

Lodge No. 46, International Association of Machinists (herein called the Union), to do so, respondent has failed and refused, and continues to fail and refuse, to bargain collectively with the Union as required by said paragraphs of said decree. More particularly, and as more fully appears from the exhibits hereto attached and made parts hereof, the Board shows the Court as follows:

1. On November 20, 1948, and thereafter, respondent refused to recognize the Union, which had been designated by a majority of its employees as their collective bargaining representative, unless the Union first established its majority status in a Board directed election. The Board found that respondent's refusal to recognize the Union was not motivated by a good faith doubt of the Union's majority status, and therefore, was violative of the Act.

2. Respondent adhered to its refusal to recognize the Union and at no time between November 20, 1948 and June 30, 1950, when the Board issued its decision and order directing respondent to bargain collectively with the Union, did respondent meet or bargain with the Union. See *infra*, pp. 11-15, 24.

3. After the issuance of the Board's order on June 30, 1950, the Union made repeated requests for a meeting to bargain collectively, but respondent delayed meeting with the Union until September 8, 1950. At the meeting held that day, the Union submitted a proposed contract to respondent and explained its provisions. Respondent did not accept or reject any of the provisions of the Union's contract proposal; did not propose any changes in the terms of the Union's proposal; and did not make any counterproposals on contract terms. Respondent stated that it would study the Union's proposed contract and either accept it or make counterproposals. See *infra*, pp. 15-16, 25-30.

4. Respondent tentatively agreed to meet again with the Union on September 18 or 21, 1950 but prior thereto canceled the meeting. Respondent stated it could meet with the Union during the following week if convenient to the Union, but the Union's representative was otherwise engaged and a meeting was not held. See *infra*, pp. 16, 30-31.

5. In and after November 1950, the Union, by letter and telephone, repeatedly requested respondent to meet and bargain collectively, but respondent failed and refused to do so and there was no meeting of the parties following the September 8, 1950, meeting until after the entry of the Court's decree. See *infra*, pp. 16-19, 31-49.

6. Respondent also failed and refused, although repeatedly requested by the Union to do so, either to convey to the Union its position on the contract proposal submitted by the Union

at the September 8, 1950 meeting, or to submit counterproposals for a contract, as it had stated at the September 8, 1950 meeting it would do. See *infra*, pp. 16-19-, 31-49.

7. At all times since the entry of the Court's decree on August 7, 1952, respondent, although repeatedly requested by the Union to do so, has failed and refused to meet with the Union for the purposes of collective bargaining. More specifically:

(a) On about August 15, 1952, the Union, by letter, requested respondent to meet on August 25, 1952, for the purposes of collective bargaining, and, prior to the meeting, to supply it with certain specified information regarding wages and conditions of employment for purposes of bargaining. Respondent did not supply the information requested or reply to the letter and no Teeting was held pursuant to the Union's request. See *infra*, pp. 19, 50.

(b) Instead, respondent, failing and refusing to bargain collectively, prograstinated meeting with the Union by engaging in an exchange of correspondence with the Board's regional office, copies of which were sent to the Union. In this correspondence (see *infra*, pp. 19-20, 51-54), respondent, *inter alia*, contended in substance that it could refuse to bargain with the Union as required by the decree on the grounds that it had already complied with the Board's order by bargaining with the Union, and that the Union allegedly had lost its majority status by reason of a turnover in personnel. Respondent requested proof from the Union that it represented a majority of the employees then employed in the bargaining unit. In truth and in fact, as respondent well knew, it had never bargained in good faith with the Union and, in truth and in law, respondent could not refuse to bargain with the Union on the ground that the Union had lost its majority status until had remediesd its unlawful refusal to bargain with the Union by good faith bargaining for a reasonable period.

(c) On about September 26, 1952, more than 6 weeks after the Union had requested a meeting, respondent agreed tentatively to meet on October 6 or 7, 1952. On about September 29, the Union, by letter, confirmed the meeting tentatively set and requested respondent to furnish the wage and working conditions information previously requested on August 15, 1952. See *infra*, pp. 20, 55.

(d) On about October 2, 1952, respondent canceled the meeting tentatively arranged for October 6 or 7, 1952. Although respondent's representative at this time stated he would be in a position to meet on October

9 or 10, 1952, if convenient to the Union, he reiterated his demand that the Union answer whether or not it then represented the employees in the bargaining unit, and he failed to furnish or mention the wage and other data which had been requested by the Union for collective bargaining purposes. The Union's representative was unavailable for the dates suggested. See *infra*, pp. 20, 56-57.

(e) On November 28, 1952, the Union wrote respondent, proposing a meeting on December 5, 6, 10, 11, or 13, 1952, or during the period of December 20 through 31, 1952, and again requesting respondent to furnish the wage and working conditions information requested on August 15 and September 29, 1952. See *infra*, pp. 20-21, 57.

(f) On December 5, 1952, respondent replied that it was unable to meet on the dates suggested, again ignored the Union's request for the wage and other data, and stated that before negotiations were resumed the Union should prove its majority status. See *infra*, pp. 21, 58.

(g) On December 8, 1952, the Union, by letter, again requested respondent to meet for collective bargaining purposes, this time suggesting either December 15, 16, 19, 20 or 21, 1952, as a date for the meeting. Respondent did not reply to the Union's letter until January 7, 1953, at which time it stated it could meet on January 20 or 21, 1953.

In its letter, however, respondent renewed its demand
16 for proof that the Union still represented the employees in the bargaining unit and stated that it would raise this question at the proposed meeting. By return letter, the Union, stating that the question of its majority status had been determined by the Board and this Court, agreed to meet on January 20, 1953, for purposes of collective bargaining and requested respondent to bring to the meeting the wage and working conditions data repeatedly requested by the Union. Thereafter, at respondent's request the meeting was advanced to January 19, 1953. See *infra*, pp. 21, 59-61.

(h) At the January 19, 1953 meeting, respondent failed and refused to bargain collectively with the Union or to furnish the wage and working conditions data requested by the Union. Instead, respondent demanded that the Union prove its majority status in a Board conducted election. Respondent confirmed this in a letter to the Union on January 20, 1953. See *infra*, pp. 21, 62.

(i) On about January 23, 1953, the Union, by letter, again requested respondent to meet with it for the purposes of collective bargaining. Respondent did not reply to this

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a PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13772

NATIONAL LABOR RELATIONS BOARD

v.

THE WARREN COMPANY, INCORPORATED

ARGUMENT AND SUBMISSION—March 3, 1952

On this day this cause was called, and after argument by William J. Avrutis, Esq., Attorney, National Labor Relations Board, for petitioner, and John Wesley Weeks, Esq., for respondent, was submitted to the Court.

1 IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13772

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

THE WARREN COMPANY, INCORPORATED, RESPONDENT

Petition for the Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D. C.

OPINION—June 24, 1952

Before Holmes, Russell, and Rives, Circuit Judges.

RIVES, *Circuit Judge:* This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10 (e) of the National Labor Relations Act as amended,[1] for enforcement of its order issued against respondent following proceedings under Section 10 of the Act. The Board's decision and order are reported at 90 N. L. R. B. 689.

2 With commendable candor respondent's counsel has stated its position as follows:

"We have controverted the findings of fact of the Board in our Response, but in all fairness to this Court we are constrained to admit that there is sufficient evidence, even though disputed, upon which to base the Board's order.

[1] 61 Stat. 136, 29 U. S. C. Supp. IV, Sec. 151 *et seq.*

"Our Contention, therefore, is that the Board's order should not be enforced by this Court, *not because of the insufficiency of evidence, but because the order has been obeyed in all of its provisions* and, *because of changed conditions not attributable to Respondent's conduct, the Union does not now represent a majority in this small unit and Respondent should not be required to bargain further with it.*" (Emphasis the respondent's.)

The Supreme Court has expressly ruled that compliance with an order of the Board does not affect the Board's right to enforcement, pointing out that the legislative history of the Act indicates that the framers of the Act contemplated "that there be 'immediately available to the Board an existing court decree to serve as a basis for contempt proceedings', in the event a renewal of the unfair practice occurs after the enforcement order." *N. L. R. B.* vs. *Mexia Textile Mills*, 339 U. S. 563, 567, 569.[2]

The same decision (see page 568) settles the doctrine that the Union's alleged loss of majority may not be urged as a defense in an enforcement proceeding. See also *N. L. R. B.* vs. *Sanson Hosiery Mills*, C. A. 5, No. 13726, decided April 10, 1952; cf. *N. L. R. B.* vs. *Aldora Mills*, C. A. 5, No. 12900 decided June 6, 1952.

It results that the Board's petition is granted and its order Enforced.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13772

NATIONAL LABOR RELATIONS BOARD,

v.

THE WARREN COMPANY, INCORPORATED

JUDGMENT—June 24, 1952

This cause came on to be heard on the petition of the National Labor Relations Board for the enforcement of an order of the Na-

[2] See also *N. L. R. B.* vs. *American National Insurance Company*, No. 126, October Term, 1951, decided May 26, 1952, see Footnote 4; *N. L. R. B.* vs. *Pool*, 339 U. S. 577, 581; *N. L. R. B.* vs. *Crompton-Highland Mills, Inc.*, 337 U. S. 217, 226; *N. L. R. B.* vs. *Hills Bros. Co.*, 161 F. 2d 179, 180 (C. A. 5); *N. L. R. B.* vs. *Davis*, 172 F. 2d 225 (C. A. 5).

tional Labor Relations Board, made on June 30th, 1950, "In the Matter of The Warren Company, Incorporated and District Lodge No. 46, International Association of Machinists," Case No. 10-CA-662; and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the petition for enforcement of the order of the said National Labor Relations Board in this cause be, and the same is hereby granted, and its order enforced.

5 In the United States Court of Appeals for the Fifth Circuit

No. 13772

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

THE WARREN COMPANY, INCORPORATED, RESPONDENT

DECREE ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD—August 7, 1952

Before: Holmes, Russell, and Rives, Circuit Judges.

BY THE COURT:

This cause came on to be heard upon the petition of the National Labor Relations Board (hereinafter referred to as the Board) to enforce its Order dated June 30, 1950. The Court heard argument of respective counsel on March 3, 1952, and has considered the briefs and the transcript of record filed in this cause. On June 24, 1952, the Court, being fully advised in the premises, handed down its decision enforcing the Board's said Order. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED that the Respondent, The Warren Company, Incorporated, Atlanta, Georgia, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in District Lodge No. 46, International Association of Machinists, or in any other labor organization of its employees, by discharging and refusing to reinstate any of its employees, by denying employment to applicants, or by discriminating in any other manner in regard to their hire and tenure of employment, or any term or condition of employment;

(b) Refusing to bargain collectively with District Lodge No. 46, International Association of Machinists, as the ex-

clusive bargaining representative of all its tool and die makers, machinists, die setters, helpers, and apprentices, excluding clerical employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act;

(c) Interrogating its employees as to union activity in the plant and their reasons for wanting a union; warning its employees that it will not have a union in its plant; and suggesting withdrawal from the aforenamed Union as a condition of employment;

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist District Lodge No. 46, International Association of Machinists, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the National Labor Relations Act, as amended.

2. Take the following affirmative action which the Board has found will effectuate the policies of the National Labor Relations Act:

(a) Offer to Robert Andrews, Truman Davis, Johnnie Haynes, and Edgar Hembree, in the maner set forth in the section of the Decision and Order of the Board, dated June 30, 1950, entitled: "The Remedy", immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges;

(b) Offer to John Kent, in the manner set forth in the said section of the aforesaid Decision and Order entitled, "The Remedy", the position discriminatorily denied him or a substantially equivalent position, without prejudice to his seniority or other rights and privileges;

(c) Make whole Robert Andrews, Truman Davis, Johnnie Haynes, Edgar Hembree, and John Kent, in the manner set forth in the said section of the aforesaid Decision and Order, entitled, "The Remedy", for any loss of pay they may have suffered as a result of the Respondent's discrimination against them;

(d) Upon request, bargain collectively with District Lodge No. 46, International Association of Machinists, as the ex-

clusive representative of the above-mentioned employees and, if an understanding is reached, embody such understanding in a signed agreement;

(e) Upon request, make available to the National Labor Relations Board, or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the rights of reinstatement under the terms of this Decree;

7 (f) Post at its plant and office in Atlanta, Georgia, copies of the notice attached hereto and marked "Appendix A". Copies of said notice, to be furnished by the Regional Director of the National Labor Relations Board for the Tenth Region (Atlanta, Georgia), shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(g) Notify the aforesaid Regional Director for the Tenth Region, in writing, within ten (10) days from the date of this Decree, what steps the Respondent has taken to comply herewith.

(Signed) E. R. HOLMES,
Judge, United States Court of Appeals for the Fifth Circuit.

(Signed) ROBERT L. RUSSELL,
Judge, United States Court of Appeals for the Fifth Circuit.

(Signed) RICHARD T. RIVES,
Judge, United States Court of Appeals for the Fifth Circuit.

8 APPENDIX A TO DECREE

NOTICE TO ALL EMPLOYEES

Pursuant to

a Decree of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Not discourage membership in District Lodge No. 46, International Association of Machinists or in any other labor

organization, by discharging and refusing to reinstate any of our employees, by denying employment to applicants, or by discriminating in any other manner in regard to their hire and tenure of employment or any term or condition of employment.

We Will Not interrogate our employees as to union activity in our plant or their reasons for wanting a union; warn our employees that we will not have a union in our plant; or suggest withdrawal from the aforenamed Union as a condition of employment.

We Will Not in any manner interfere with, restrain or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist District Lodge No. 46, International Association of Machinists, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any, or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

We Will offer to the individuals named below immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered as a result of our discrimination against them, as set forth in the Board's aforesaid Order:

Robert Andrews	Johnnie Haynes
Truman Davis	Edgar Hembree

We Will offer to the individual named below immediate and full employment in the position discriminatorily denied him or in a substantially equivalent position without prejudice to any seniority or other rights and privileges he would have enjoyed in the absence of our discrimination against him, and make him whole for any loss of pay suffered as a result of our discrimination against him, as set forth in the Board's aforesaid Order.

John Kent

We will bargain collectively upon request, with District Lodge No. 46, International Association of Machinists, as the exclusive bargaining unit described herein, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All tool and die makers, machinists, die setters, helpers, and apprentices, excluding clerical employees, professional employees, guards, and supervisors as defined in the Act.

All our employees are free to become, remain or refrain from becoming members of the above-named Union or any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8(a)(3) of the Act. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of membership in or activity on behalf of any such labor organization.

THE WARREN COMPANY, INCORPORATED,
Employer.

Dated _____ By _____
(Representative) *(Title)*

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[File endorsement omitted]

In United States Court of Appeals for the Fifth Circuit

[Title omitted]

PETITION FOR ADJUDICATION IN CIVIL CONTEMPT AND FOR OTHER CIVIL RELIEF; AND REQUEST FOR INSTITUTION OF, ADJUDICATION IN, AND PUNISHMENT FOR CRIMINAL CONTEMPT—Filed Sept. 22, 1953

To the Honorable, the Judges of the United States Court of Appeals for the Fifth Circuit:

Comes now the National Labor Relations Board (herein called the Board), and respectfully petitions this Court to adjudge respondent The Warren Company, Incorporated, in civil contempt of this Court for failing and refusing to obey the decree of this Court entered herein on August 7, 1952, and for other civil relief.

Further, the Board respectfully requests this Court to institute, *sua sponte*, a prosecution of said The Warren Company, Incorporated, for criminal contempt of this Court by reason of its having knowingly, and wilfully and intentionally, violated and disobeyed the said decree of this Court and to adjudge it in, and punish it for, such criminal contempt.

In support of its petition herein for adjudication in civil contempt and for other civil relief and its request for the institution of, adjudication in and punishment for, criminal contempt, the Board alleges, upon information and belief, as follows:

11 In Respect to the Petition for Adjudication in Civil Contempt and for Other Civil Relief

I. On August 7, 1952, this Court entered its decree herein enforcing in full an order of the Board issued on June 30, 1950, against

35 EXHIBIT 3 TO AFFIDAVIT

July 26, 1950

Re: The Warren Company, Incorporated
Atlanta, Georgia

Case No. 10-CA-622

The Warren Company, Incorporated
905 Memorial Drive, S. E.,
Atlanta, Georgia

GENTLEMEN:

Please refer to our letter to you dated July 4, 1950, wherein we requested that you bargain collectively with District Lodge No. 46, International Association of Machinists, as the exclusive representative of all your employees classified as, or performing the work of, tool and die makers, machinists, die setters, helpers, and apprentices.

We note that the National Labor Relations Board has forwarded you Notices to be posted, in regard to the Board's Decision and Order in subject case.

Under date of July 6, 1950 we were advised by Hon. John Wesley Weekes that he would contact us soon after July 10th, but to date we have not been advised as to when we may meet for the purpose above stated. We stand ready to arrange conferences with you for that purpose.

In the meantime please furnish me with a list of employees and their classifications and wage rates on November 9, 1948, together with any changes of employees and their rates to date, together with a list of present employees and their wage rates in said classifications.

I enclose a pamphlet, "Spotlight on the International Association of Machinists", which will give you a brief synopsis of the Association, and will be pleased to go into more details if you desire.

Awaiting an early reply, I am

Very truly yours,

(S.) PAUL CHIPMAN,
Grand Lodge Representative.

PC:cj
cc: NLRB
Atty. Weekes

36 EXHIBIT 4 TO AFFIDAVIT

August 1, 1950

Mr. Paul Chipman,
Grand Lodge Representative,
International Association of Machinists,
Chamber of Commerce Bldg.,
Atlanta, Georgia

Dear Paul:

Re: The Warren Company, Inc.
Case No. 10-CA-722

Complying with your recent request for a list of the employees in the Machine Shop as of November 9, 1948 and as of the present date, I am glad to give you these lists with their respective classes and wage rates as follows:

November 10, 1948		July 26, 1950	
O. E. Wages, Die Maker	2.00	W. R. Roberts, Die Maker	2.00
R. R. Andrews, Machinist	1.65	C. E. McAllaster, Machinist	1.80
C. F. Findlay, Machinist	1.50	M. E. Rucker, Machinist	1.75
J. L. Haynes, Machinist	1.50	C. A. Smelley, Machinist	1.45
T. W. Davis, Machinist	1.40	E. L. Reeves, Machinist	1.40
E. A. Hembree, Machinist	1.40	P. J. Waters, Machinist	1.25
C. A. Smelley, Machinist	1.35	I. N. Cabe, Machinist	1.25
E. L. Reaves, Machinist	1.35	H. E. Knight, Helper	.85
E. H. Whitehead, Die Setter	1.30		

I am mindful of your request to bargain with this Company and regret the delay in arranging a conference. I will be out of town probably for the next week. I suggest, however, that as a preliminary step in our bargaining that you forward to me a copy of your proposed agreement. We will then be in a position to either agree, disagree or make counterproposal.

With kindest personal regards, I am

Sincerely,

WEEKES & CANDLER
By: (S.) JOHN WESLEY WEEKES

JWW:SH

CC: Mr. James Mackle,
National Labor Relations Board,
Atlanta National Bldg.,
50 Whitehall Street,
Atlanta, Georgia.

37 EXHIBIT 5 TO AFFIDAVIT

Room 504, 33 Pryor Street, N. E.,
Atlanta 3, Georgia

September 1, 1950

Subj: The Warren Co., Inc.,
Atlanta, Ga.

Case No. 10-CA-622

Hon. John Wesley Weekes,
Counsel, The Warren Co., Inc.,
P. O. Box 250,
Decatur, Georgia

Dear Colonel:

In reference to your reply to my letter requesting conference will advise that I have met with the employees involved in the bargaining unit in subject case and have ascertained their desire as to the terms of the collective bargaining agreement with the above named Employer.

We are prepared to meet representatives of said Employer having the authority to bargain collectively to a conclusion, and to embody such agreement as reached in a signed agreement.

I suggest that we meet for the above stated purpose in the Employer's offices in Atlanta, Georgia on either September 7, 8 or 9, 1950 at 10:00 o'clock, A. M., and that all be prepared to continue conferences daily until such agreement has been executed. I will have prepared and ready for submission at that time our proposed agreement, and will present it at the initial meeting.

Trusting we will have your reply not later than September 6, 1950, and that you will not further postpone our meeting, we are

Sincerely,

District Lodge No. 46, International Association of Machinists,
By (S.) PAUL CHIPMAN,
Grand Lodge Representative.

cc Employer (Reg.-Ret. Recpt. Retq.
NLRB

letter. Instead, respondent, on about January 27, 1953, filed a petition with the regional office of the Board requesting an election in the bargaining unit. Because of respondent's failure to remedy its unfair labor practice by good faith bargaining with the Union for a reasonable period, the Regional Director of the Board, on about January 27, 1953,

17 dismissed the petition for an election, and the Board on March 4, 1953, denied respondent's appeal and sustained the Regional Director's dismissal. See *infra*, p. 22.

(j) Thereafter, on about March 9, 1953, the Union, by letter, again requested respondent to meet and bargain collectively with it pursuant to this Court's decree. Respondent did not reply to the letter and since has continued to fail and refuse to meet with the Union for purposes of collective bargaining. See *infra*, pp. 22, 65.

8. At all times since respondent's initial refusal to bargain collectively with the Union in November 1948, respondent has failed and refused to bargain collectively in good faith with the Union, and, during the aforementioned period, has met with the Union on only two occasions, namely: on September 8, 1950, when the Union submitted its contract proposal and respondent stated, without any bargaining thereon, that it would consider the proposal and submit counterproposals on any acceptable provisions, which respondent never did; and on January 19, 1953, when respondent, never having bargained in good faith with the Union, categorically refused to bargain with the Union unless the Union again demonstrated its right to represent the employees by winning a Board conducted election.

IV. At all times since the entry of the said decree, respondent has failed and refused, and continues to fail and refuse, to post at its plant and offices in Atlanta, Georgia, copies of the notice as required by paragraph 2(f) of the decree. More particularly:

1. Since entry of the decree, respondent, although repeatedly informed by the Board of its obligation to do so, has failed and refused to post notices, as required by the decree, on the ground that in 1950, prior to the entry of the decree, it allegedly had posted notices in compliance with the Board's order. In truth,

18 respondent, although it physically posted notices in 1950 in the form specified in the Board's order, did not thereby comply with the notice-posting provisions of said order. In substance, said notices stated, *inter alia*, that pursuant to said order respondent would bargain upon request with the Union. As set forth above in paragraph III, and its subparagraphs, at the time respondent physically posted the notice, and ever since then, respond-

ent, contrary to this express statement in the notice, failed and refused to bargain with the Union. Thereby, respondent rendered the notices it had posted of no effect whatsoever and defeated and frustrated the purpose and objective of the notice posting directives of the Board's order; and, therefore, respondent has not complied with said directive.

V. By its conduct hereinabove described in paragraphs III and its subparagraph 7, and IV and its subparagraph, respondent has been, and is, violating, and failing and refusing to obey and comply with, and continues to violate, and to fail and refuse to obey and comply with, the said decree of this Court. Thereby, respondent has been, is, and continues to be, in civil contempt of this Court.

WHEREFORE, the Board respectfully prays:

1. That this Court issue an order requiring respondent to file, by a day certain, a sworn answer to the allegations of the foregoing petition for adjudication in civil contempt in which it shall specifically admit or deny, or meet by affirmative defense, each and every allegation of said petition and the facts set forth in the exhibits thereto attached.

2. That the Court issue an order requiring respondent, through an authorized representative, to appear before this Court, at a time and place fixed by the Court, and show cause, if any there be, why it should not be adjudged in civil contempt for failing and refusing to obey and comply with the said decree of this Court.

3. That upon its appearance pursuant to the order to show cause, respondent be adjudged in civil contempt of Court,

19 4. That the Court enter an order requiring respondent to purge itself of such civil contempt by:

(a) Upon request, bargaining in good faith with the Union as the exclusive representative of the above-described employees of respondent in respect to wages, hours and other terms and conditions of employment, and, if an understanding is reached, embodying such understanding in a written, signed agreement;

(b) Immediately posting in conspicuous places, including all places where notices to employees customarily are posted, for a period of at least sixty (60) consecutive days, copies of an appropriate notice, signed by respondent, stating that respondent has been adjudged in contempt of court for failing and refusing to bargain collectively with the Union as required by said decree and that it will now bargain in good faith with the Union, and, if an understanding is reached, embody such understanding in a written, signed agreement; and by maintaining the notices in clearly legible condition without alteration or defacement throughout such posting period;

(c) Filing a sworn statement with the Clerk of this Court and a copy thereof with the Director of the Tenth Region of the Board, within thirty (30) days after the entry of the order of adjudication, showing the steps taken by respondent to comply with the Court's order, and filing further sworn statements on the first and fifteenth days of each month thereafter as to the manner of respondent's bargaining with the Union, until the Court by further order determines that respondent is bargaining in good faith with the Union;

(e) Paying to the Board all court costs and reasonable counsel fees; as well as all costs and expenditures incurred by the Board in the investigation, preparation, presentation and final disposition of this proceeding to adjudge respondent in civil contempt.

5. That upon failure of respondent to so purge itself of its civil contempt, the Court issue attachment against it.

6. That the Court take such other and further action and grant such other and further relief as may be just, reasonable and necessary to make effective the said decree of this Court, and as this proceeding in civil contempt may require.

In Respect to the Request for Institution of, Adjudication in, and Punishment for Criminal Contempt

VI. In respect to the request for the institution of, adjudication in, and punishment for criminal contempt, the Board reiterates and realleges, with the same force and effect as though herein set forth at length, each and every allegation hereinabove set forth in paragraphs I through IV, inclusive, and all subparagraphs thereto.

VII. The aforesaid The Warren Company, Incorporated, engaged in the acts and conduct hereinabove described in paragraph III and its subparagraph 7, and paragraph IV and its subparagraph, knowingly and wilfully and with intent to, and thereby did, defy, disobey, and violate and resist the said decree of this Court. Thereby, said The Warren Company, Inc., has been and is in criminal contempt of this Court and its lawful authority.

WHEREFORE, the Board respectfully requests:

1. That the Court institute, *sua sponte*, a prosecution of the Warren Company, Incorporated, for criminal contempt of this Court.

2. That the Court appoint and designate David P. Findling, Winthrop A. Johns, Julius G. Serot and Charles M. Henderson, attorneys for the Board, as counsel for the Court to prosecute the criminal contempt.

3. That the Court issue an order requiring said The Warren Company, Incorporated, through an officer thereof, personally to appear

before this Court at a time and place fixed by the Court, and then and there show cause, if any there be, why it should not be adjudged in and punished for criminal contempt of this Court for
21 having wilfully and knowingly, and with intent to do so, defied, disobeyed, violated and resisted the said decree of this Court.

4. That upon the return of said order to show cause, said The Warren Company, Incorporated, be adjudged in criminal contempt of this Court and punished by fine or imprisonment, or both, in such manner as the Court may deem just and proper.

Dated at Washington, D.C., this 8th day of September, 1953.

National Labor Relations Board.
By (S.) WINTHROP A. JOHNS,
Assistant General Counsel.

(S.) GEORGE J. BOTT,
General Counsel.
DAVID P. FINDLING,
Associate General Counsel.
WINTHROP A. JOHNS,
Assistant General Counsel.
JULIUS G. SEROT,
Attorney.
CHARLES M. HENDERSON,
Attorney.
NATIONAL LABOR RELATIONS BOARD,
Washington 25, D. C.

22 *Duly sworn to by Winthrop A. Johns. Jurat omitted in printing.*

23 EXHIBIT "A" TO PETITION

United States Court of Appeals for the Fifth Circuit

No. 13772

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE WARREN COMPANY, INCORPORATED, RESPONDENT

STATE OF GEORGIA,
County of Fulton, ss:

I, PAUL CHIPMAN, being duly sworn, depose and say that:

1. I am Grand Lodge Representative for the International Association of Machinists, and in such capacity negotiate collective

bargaining agreements with employers on behalf of its various member lodges. From the beginning, I have represented District Lodge No. 46 of our union (herein called the Union), with which respondent was directed to bargain collectively by the decree of this Court entered herein on August 7, 1952, in its attempts to negotiate a contract with respondent. As I shall show below, respondent has failed and refused to obey and comply with the bargaining directives of the decree.

2. Attached as exhibits to this affidavit are true and accurate copies of correspondence relating to the Union's efforts to bargain collectively with respondent.

3. At all times since the Union was designated as their collective bargaining representative by a majority of the employees in the bargaining unit described in this Court's decree, respondent has failed and refused to bargain in good faith with the Union.

4. As the prior proceedings herein show, on November 8, 1948, the Union, which shortly before then had been designated
24 by the employees as their collective bargaining representative, informed respondent that it represented the employees and requested respondent to bargain collectively. The very next day, and the day following, respondent discharged four of the employees in the unit because of their Union affiliation and then, on November 13, 1948, replied to the Union, declining to bargain because, allegedly, it doubted that the Union represented a majority of the employees. On November 20, 1948, the Union again requested bargaining. Respondent, reiterating its alleged doubt as to the Union's majority status, refused to recognize or bargain with the Union unless and until such status were established in an election directed and conducted by the National Labor Relations Board. The Union thereupon filed unfair labor practice charges with the Board, which, on June 30, 1950, issued its Decision and Order holding that respondent had violated the National Labor Relations Act and ordering it to bargain with the Union on request and to reinstate the discharged employees. It was upon these facts that this Court entered its decree herein, enforcing in full the Board's order.

5. During the pendency of the charges before the Board, respondent continued its refusal to bargain with the Union and there was no meeting between the parties. On March 9, 1950, shortly after the Trial Examiner issued his Intermediate Report recommending the entry of an order against respondent directing respondent to bargain with the Union, the Union again requested respondent to meet with it but respondent failed and refused to do so. (Exhibit 1)

6. The Board's order was issued on June 30, 1950, and, on July 4, 1950, I wrote to respondent requesting a bargaining conference. I had to write several times before I could succeed in arranging a

meeting but finally I arranged a meeting for September 8, 1950, with John Wesley Weekes, respondent's attorney and collective bargaining representative and, on that day, respondent met with the Union for the first and only time since the Union first requested bargaining in 1948. (Exhibits 2, 3, 4, 5 and 6)

25 7. At the meeting of September 8, 1950, I handed Mr. Weekes our contract proposal and explained various of its provisions. Mr. Weekes neither rejected nor accepted the Union's contract proposal but said that he would study it and consult with respondent, and then would either indicate his agreement to it or submit counterproposals. To this date, however, neither Mr. Weekes nor any other representative of respondent has indicated any agreement or disagreement with our contract proposal or any of its provisions, or submitted any counterproposal, although I have repeatedly requested respondent to do so.

8. That one meeting on September 8, 1950, was the first and last and only contract bargaining meeting ever held; and it cannot be considered anything other than a preliminary negotiating meeting. Although repeatedly requested to do so, respondent has never again met with me or any other representative of the Union for collective bargaining purposes.

9. At the September 8, 1950 meeting tentative arrangements were made for another meeting for September 18 or 21, 1950. Prior to September 18, 1950, Mr. Weekes cancelled that meeting, advising me that he would be out of the city during that week. He stated that he would be available for a meeting the following week if convenient to the Union. However, other matters had been scheduled for the dates mentioned by Mr. Weekes and until late November I was engaged in a series of Board hearings which took up my time. (Exhibit 7)

10. On November 29, 1950, I wrote Mr. Weekes (Exhibit 8) requesting a meeting for December 4 or 8, or for anytime during the week of December 11, 1950. Neither Mr. Weekes nor any representative of respondent ever replied to that letter.

11. On March 5, 1951, I again wrote Mr. Weekes (Exhibit 9), requesting a meeting for March 17, 1951. In this letter I also reminded Mr. Weekes that he had promised at the September 8, 1950, meeting to submit counterproposals if the Union's contract proposals were unacceptable. On March 9, 1951, Mr. Weekes
26 answered (Exhibit 10) that he did not want to meet on March 17, and would be unavailable the following week but that he would be available for a meeting thereafter. He made no mention of the requested, and promised, counterproposals.

12. On March 21, 1951, I replied to Mr. Weekes (Exhibit 11) that I would be prepared to meet with him any day during the week he suggested, and I asked him to let me know what date would

be acceptable. In this letter, I again reminded Mr. Weekes of his promise to submit counterproposals and asked him if he would do so at once. On March 22, 1951, Mr. Weekes replied (Exhibit 12) stating that he would be in Texas during the week he had previously proposed for a meeting and that he would arrange a conference upon his return. Again Mr. Weekes did not mention the counterproposals.

13. On March 23, 1951, I wrote directly to respondent company. (Exhibit 13) In the letter, I reviewed the meeting I had had with Mr. Weekes on September 8, 1950, and his promise to submit counterproposals if respondent could not agree to the Union's proposed contract, the failure to receive such counterproposals and the futile efforts I had made since then to arrange a meeting with Mr. Weekes. I also stated that the Union was willing to meet with Mr. Weekes, as respondent's representative, in Texas and if that were not possible that respondent designate another representative who could and would meet and bargain with the Union during the week of March 27, 1951, the week Mr. Weekes himself had previously proposed for a meeting. Respondent did not reply to this letter.

14. On April 9, 1951, Mr. Weekes sent me a letter (Exhibit 14) berating me for having written directly to his client and stating that he would be available for a meeting on April 27, 1951. On April 16, 1951, I replied (Exhibit 15) accepting the meeting date he had proposed. However, on April 27, Mr. Weekes cancelled the meeting (Exhibit 16).

15. On May 12, 1951, I again wrote Mr. Weekes (Exhibit 17) requesting a meeting. Neither Mr. Weekes nor anyone else on behalf of respondent replied to this letter. On May 28, 1951,
27 I again wrote Mr. Weekes (Exhibit 18) requesting a meeting. On June 7, 1951, Mr. Weekes replied (Exhibit 19), stating that he would "try to arrange" a meeting. On July 12, 1951, not having heard further from Mr. Weekes or anyone else representing respondent, I again wrote Mr. Weekes (Exhibit 20) requesting a meeting. Neither Mr. Weekes nor anyone else representing respondent replied to this letter.

16. On July 31, 1951, I again wrote Mr. Weekes (Exhibit 21) inquiring whether Mr. Weekes still represented respondent, whether he still had authority to negotiate an agreement on behalf of respondent, and whether he was "just stalling" or intended to meet with the Union. I also asked Mr. Weekes either to set a date for a meeting and attend the meeting or advise me that he did not intend to meet further with the Union. On August 2, 1951, Mr. Weekes replied to this letter (Exhibit 22), stating that he still represented respondent and had authority to negotiate an agreement. In response to my request for a meeting, Mr. Weekes said he would telephone me later to make a definite appointment.

17. Mr. Weekes did not call me but, on August 6, 1951, he wrote me (Exhibit 23) that there had been a turn-over in the company's personnel and that "we doubt the majority status of the Union as a bargaining representative." Mr. Weekes stated further that on August 16, 1951, "we will be glad to meet with you and discuss this feature, and to discuss what proof you have of the majority status."

18. In a telephone conversation with Mr. Weekes on August 15, in which I pointed out that the Union would meet for the purposes of collective bargaining pursuant to the order of the Board and not to discuss the majority status, we arranged to meet on August 16, the date suggested by Mr. Weekes. However, just before the meeting, Mr. Weekes, as he had done on previous occasions, called and cancelled the meeting.

28 19. On August 17, 1951, I wrote Mr. Weekes (Exhibit 24), expressing disappointment at his cancellation of our meeting scheduled for the preceding day, requesting him to fix a date for another meeting and stating that I would meet with him in the evenings or on Sunday if he could not meet with me at any other time. Neither Mr. Weekes nor anyone else representing respondent replied to this letter.

20. On August 15, 1952, after the entry of this Court's decree on August 7, 1952, I again wrote Mr. Weekes (Exhibit 25), reminding him of the entry of the Court's decree and requesting a meeting for August 25, 1952. In the letter I requested that prior to the meeting respondent furnish the Union with information showing the classification and wage rates of the employees, the number of employees in each classification, any increases granted since April 20, 1950, and fringe benefits presently enjoyed by the employees, including paid holidays, rest periods, workday and workweek, shift differentials, pay for voting time, payment for time off because of death in family, insurance or other welfare plans. Neither Mr. Weekes nor anyone else on behalf of respondent replied to this letter.

21. Instead, Mr. Weekes sent me a copy of a letter, dated August 26, 1952, which he had written the Board's Atlanta Regional Office (Exhibit 26) In the letter, respondent stated, among other things, that "full compliance" with the order of the Board had taken place. This statement was contrary to the facts, and I immediately wrote to the Board's Regional Office, under date of August 29, 1952, (Exhibit 27) pointing out that respondent had never complied with the Board's order requiring bargaining in good faith with the Union. As I pointed out in my letter, the Union had been able to have only one bargaining meeting with respondent, on September 8, 1950; the Union had submitted a proposed agreement at that meeting, and Mr. Weekes had requested time to study the proposal and submit a counterproposal, and since then respondent had never met again with the

Union or submitted any counterproposal to the Union's
29 contract proposal. In short, respondent had not made the slightest attempt to remedy its original refusal to bargain.

22. I sent Mr. Weekes a copy of my letter to the Board. On September 2, 1952, Mr. Weekes, in reply to my letter, sent the Board another letter (Exhibit 28) in which, among other things, while professing to be ready and willing to bargain with the Union respondent nevertheless claimed that it was "entitled" to an answer from me as to whether the Union represented the employees; and respondent indicated that it would refuse to bargain with the Union unless we again proved the Union's majority status. Subsequently, I received a copy of a letter, dated September 25, 1952, from the Board to Mr. Weekes stating, in effect, that respondent had not discharged its obligation under the decree to bargain with the Union and should do so immediately.

23. On September 26, 1952, I accidentally met Mr. Weekes in the Atlanta office of the Board and succeeded in arranging a tentative collective bargaining meeting for October 6 or 7, 1952. On September 29 I wrote Mr. Weekes (Exhibit 29) confirming the date for the meeting and renewing my request for the information requested in my letter of August 15, 1952, so that I might intelligently negotiate with respondent on those items. However, on October 2, 1952, Mr. Weekes wrote me (Exhibit 30), that he would be unable to meet on either October 6 or 7, as we had tentatively arranged. Although he added that he would be able to meet on October 9 or 10 if convenient to me, he again indicated that respondent did not intend to bargain collectively with the Union unless it reproved its majority status. And Mr. Weekes did not furnish the collective bargaining information I had repeatedly requested.

24. Because of the pressure of other business and a death in my family, I was unable to reply to Mr. Weekes' letter, until November 28, 1952. On that date, I wrote Mr. Weekes (Exhibit 31), proposing a meeting for December 5, 6, 10, 11, 12, 13, or any day during the period December 20 through 31, 1952. I also asked Mr. Weekes to supply the information requested previously in my letters
30 of August 15 and September 29, 1952. On December 5, Mr. Weekes replied (Exhibit 32), stating he was unable to meet on the date suggested, making no suggestion as to when he could meet, and again indicating that he would not meet for collective bargaining with the Union unless it again proved its majority status.

25. On December 8, 1952, I again wrote Mr. Weekes (Exhibit 33), requesting him to let me know the earliest date he could meet with the Union and suggesting December 15, 16, 19, 20 or 21. Mr. Weekes did not reply to this letter until January 7, 1953 (Exhibit 34). In his reply, Mr. Weekes, suggesting a meeting for January 20 and 21,

1953, again questioned the Union's right to bargain for the employees in the bargaining unit, and concluded by saying, "We will discuss this matter in our meeting on either of the above two dates." On January 8, 1953, I replied (Exhibit 35), agreeing to meet with Mr. Weekes on January 20. However, I pointed out that the Union's status as the employees' representative had been determined and that our meeting on January 20 would be for purposes of collective bargaining. I requested him to bring to the meeting the information which I had requested in my previous letters.

26. Subsequently, at Mr. Weekes' request, the meeting was advanced to January 19, 1953, and we met that day, the second time in 4 years of fruitless efforts to bargain. But this meeting was not a collective bargaining meeting. Respondent flatly refused to discuss contract terms, and did not supply any of the information we had so often requested. Instead, Mr. Weekes asked me to consent to an election to be held by the Board to determine whether or not the Union still represented a majority of the employees. I refused to consent to an election and reiterated our request that respondent bargain collectively with the Union as required by the decree, but respondent would not do so. The following day, Mr. Weekes confirmed respondent's refusal to bargain with the Union unless and until its majority status were established in a Board conducted election (Exhibit 36).

31 27. On January 23, 1953, I wrote Mr. Weekes (Exhibit 37), again requesting respondent to bargain collectively with the Union as required by this Court's decree and pointing out that under the law respondent could not challenge the Union's majority status in this case until it had remedied its previous refusal to bargain with the Union by subsequent good faith negotiations. As I noted in my letter, it was rather surprising that respondent now assertedly felt that an election was required because it "feels [it] should be guided by the wishes of [its] employees." This entire case, the Board proceedings and the Court proceedings, resulted from respondent's refusal to be guided by the wishes of their employees. Respondent had even gone so far as to discharge four of the employees because they had expressed their wish to be represented by the Union. Neither Mr. Weekes nor anyone else representing respondent ever replied to this letter.

28. Instead, or or about January 27, 1953, respondent filed a petition with the Board's Regional Office requesting an election in the bargaining unit. The Regional Director dismissed the petition and, thereafter, the dismissal was sustained by the Board on March 4, 1953.

29. On March 9, 1953, I wrote Mr. Weekes (Exhibit 38), noting that the decertification petition had been dismissed and again requested a meeting for collective bargaining. Neither Mr. Weekes

nor any other representative of respondent ever replied to this letter; nor have I or any other representative of the Union since been contacted by respondent for a collective bargaining meeting.

30. Respondent has never bargained in good faith with the Union and has never discharged its obligation under this Court's decree. As soon as the Union requested bargaining in November 1948, respondent took steps to dissipate the Union's majority by unlawful coercion, restraint and discharge of employees in the bargaining unit. Thereafter, respondent refused to bargain with the Union alleging a doubt as to the Union's majority status, a doubt which the Board and the Court held was not asserted good faith. After the Board ordered it to bargain, respondent met once with the
32 Union, on September 8, 1950, and received the Union's contract proposals but neither then nor since has respondent negotiated with respect to these or any proposals. After September 8, 1950, respondent avoided a further meeting with the Union until January 19, 1953, 6 months after this Court's decree, failed to submit counterproposals for a contract which it had promised to do, and when it did meet with the Union on January 19, merely repeated its unlawful conduct of November 1948, again refusing to bargain with the Union until it demonstrated its majority status in a Board election.

31. I have read the foregoing affidavit and state that everything therein stated on personal knowledge is true and that everything alleged on information and belief I believe to be true.

(S.) PAUL CHIPMAN

Subscribed and sworn to before me this day of , 1953.

Notary Public, Fulton County.

My commission expires:
(Seal)

33 EXHIBIT 1 TO AFFIDAVIT

March 9, 1950

The Warren Company, Incorporated
905 Memorial Drive, S. E.,
Atlanta, Georgia

GENTLEMEN:

You have by this time had an opportunity to study the Report and Recommendations of the Trial Examiner rendered in National Labor Relations Board Case No. 10-CA-622. The International Association of Machinists stand ready to meet with you at your earliest convenience to work out an agreement to effectuate and comply with the terms of the said Report and Recommendations.

We suggest a conference in your office at 2:00 P.M. Monday, March 13, 1950, or if you prefer, and will phone our office, we can meet with you Saturday, March 11, at 10:00 A.M.

Looking forward to an amicable relationship, I am

Very truly yours,

PAUL CHIPMAN,
Grand Lodge Representative,

Phone: ALpine 3362.

PC:cj
CC Att'y Weekes
NLRB
Blind CC:
Hayes, IP
King, B. Rep.

34 EXHIBIT 2 TO AFFIDAVIT

LAW OFFICES
WEEKES & CANDLER
Decatur, Georgia

John Wesley Weekes
Charles Murphey Candler, Jr.

July 6, 1950

Mr. Paul Chipman,
Room 504,
33 Pryor Street, NE
Atlanta, Georgia

Re: The Warren Company

Dear Paul:

Receipt is acknowledged of your letter of July 4th, requesting a bargaining conference with the above named Company.

I am to confer with the officers of the Company during the early part of the week of July 10th. After my conference with them, I will contact you and make a date for a formal bargaining conference. At the present, it will be impossible for us to meet with you either on July 10th or July 11th.

With kindest regards, I am

Sincerely,

WEEKES & CANDLER,
By: (S.) JOHN WESLEY WEEKES.

JWW:SH

55 EXHIBIT 22 TO AFFIDAVIT

Law Offices
WEEKES & CANDLER
Decatur, Georgia

John Wesley Weekes
Charles Murphey Candler, Jr.,

August 2nd
1951

Mr. Paul Chipman
Grand Lodge Representative
45 Third Street NE, Suite 3
Atlanta 5, Georgia

Dear Paul:

In re: The Warren Company, Inc.,
Atlanta, Georgia.

Thank you for your letter of July 31st, with reference to the above company. I still represent the Company and have authority to negotiate an agreement.

It is always a pleasure to meet with you at any time and as soon as I can reach Mr. Harris of the Company, I will call you and make a definite appointment.

With kindest regards, I am,

Sincerely,

WEEKES & CANDLER,
By (S.) JOHN WESLEY WEEKES.

w.d.

56 EXHIBIT 23 TO AFFIDAVIT

Law Offices
WEEKES & CANDLER
Decatur, Georgia
John Wesley Weekes
Charles Murphey Candler, Jr.

August 6th,
1951

Mr. Paul Chipman
Grand Lodge Representative
45 Third Street NE, Suite 3
Atlanta 5, Georgia.

Dear Paul:

In re: The Warren Company, Inc.,
Atlanta, Georgia.

On November 10, 1948, about the date of the certification of the Union by the Board as the bargaining agent for the machine shop, we had nine (9) employees, who were:

O. E. Wages; R. R. Andrews; C. F. Findlay; J. L. Haynes; T. W. Davis; E. A. Hembree; C. A. Smelley; E. L. Reaves; E. H. Whitehead.

At present the employees in the machine shop are:

P. A. Wright; C. A. Smelley; E. L. Reaves; M. E. Rucker; W. R. Roberts; P. J. Waters; O. L. Vaughan.

In addition to the above seven (7) employees one J. A. Mitchell is working as a helper.

57 You will see that there are only two of those who are presently employed, Messrs. Smelley and Reaves, who were employed at the time of the certification.

You will recall that no election was held, but because of alleged unfair practices the Board certified the Union as the bargaining agent. We doubt the majority status of the Union as a bargaining agent.

We will be glad to meet with you and discuss this feature, and to discuss what proof you have of the majority status.

If it meets with your convenience, we will be glad to meet with you on Thursday, August 16th, in your offices, at 11 o'clock in the morning. If this date and hour is not satisfactory, please suggest some other time.

With kindest regards, I am

Very truly yours,

WEEKES & CANDLER,
By (S.) JOHN WESLEY WEEKES.

w/

38 EXHIBIT 6 TO AFFIDAVIT

Sept. 5th,
1950.

Mr. Paul Chipman,
Grand Lodge Representative,
International Ass'n. of Mach.,
33 Pryor Street NE,
Atlanta 3, Ga.

Dear Paul:

In re: The Warren Co., Inc.

Receipt is acknowledged of your letter of Sept. 1st requesting a bargaining conference with the above Company.

You will refer to my letter of August 1st in which I requested that you forward to us a copy of your proposed agreement, in order that we could then be in a position to bargain more intelligently and to offer definite counter-proposals. Since writing you this letter on the above date, I have not had a reply from you and have received no telephonic communications regarding the subject matter. I think that it will expedite the conferences if you will forward such proposal to me.

If I am not detained in DeKalb Superior Court which convenes the week of September 4th, I will be glad to meet with you in your office at 10 o'clock on Friday, September 8th, to discuss proposed features of the contract.

I have been authorized by the Company to bargain for it.

In the meantime, I urge that you send me a copy of your proposed contract.

With kindest regards, I am,

Sincerely,

Weekes & Candler.
By (S.) JOHN WESLEY WEEKES.

CC TO:
Mr. John C. Getreu,
Reg. Dir. 10th Reg.,
NLRB, Atlanta.

39 EXHIBIT 7 TO AFFIDAVIT

Sept. 12th, 1950.

Mr. Paul Chipman,
Grand Lodge Representative,
International Ass'n. of Mach.,
33 Pryor Street NE,
Atlanta 3, Ga.

Dear Paul:

In re: Warren Co., Inc., Atlanta, Ga.

Following our conference in your office on Sept. 8th, at which time you handed me proposals for a contract between your Union and the Company, and discussed some of its provisions, I have talked with Mr. V. P. Warren, II, as to a suitable time for another meeting. He was agreeable to the tentative arrangement for Sept. 18th or Sept. 21st.

However, I received a call which will take me out of the city all of next week and I will not be available for either of these two dates.

We will be glad to meet with you during the following week on a date which suits your convenience.

With kindest personal regards, I am,

Very truly,

Weeks & Candler.
By (S.) JOHN WESLEY WEEKES.

w.d.
CC TO:
Mr. John C. Getreu,
Reg. Dir. 10th Reg.,
NLRB, Atlanta.

40 EXHIBIT 8 TO AFFIDAVIT

Suite 3, 45 Third Street, N.E.,
Atlanta 5, Georgia,
November 29, 1950.

Subj.: The Warren Company, Inc.,
Atlanta, Georgia.
Case No. 10-CA-622.

Hon. John Wesley Weekes,
Counsel, The Warren Company, Inc.,
P.O. Box 250,
Decatur, Georgia.

Dear Colonel:

I regret that a series of NLRB hearings and the subsequent preparation of briefs has kept me busy between Florida, Louisiana, Mississippi and South Carolina until this week, and I have just gotten the last urgent job out of the way.

I can meet you in further negotiations as to an agreement covering hours, wages, and other conditions of employment as per the order of the National Labor Relations Board in above numbered case at any time during the week of December 11, 1950, or on either December 4 or 8 in event you prefer the earlier date.

Thanking you to advise of the earliest of the above dates that will suit the convenience of yourself and the Employer to meet with the undersigned, and with kindest personal regards, I am,

Very truly yours,

PAUL CHIPMAN,
Grand Lodge Representative.
New Phone Number VErnon 0855.
(NOTE new office address.)

Not on orig.
CC IP.
BRep King.

41 EXHIBIT 9 TO AFFIDAVIT

March 5, 1951.

Subj.: The Warren Company, Inc.
Atlanta, Georgia.
Case No. 10-CA-622.

Hon. John Wesley Weekes,
Counsel, The Warren Company, Inc.,
P.O. Box 250,
Decatur, Georgia.

Dear Sir: I understood from our last conference that upon our furnishing you with copy of a proposed agreement that you and

your above-named client would study that proposal, and that if you could not agree thereto that you would submit a counter-proposal. I have not as yet received such counter-proposal.

This is to request a conference for further bargaining on an agreement in accordance with the order of the National Labor Relations Board in subject case at the Employer's office on March 17, 1951 at 10:00 a.m.

Thanking you to comply with this request and advise by return mail in respect thereto, I am

Very truly yours,

PAUL CHIPMAN,
Grand Lodge Representative.

PC/d
cc/I.P.
Bus. Rep. King.

42 EXHIBIT 10 TO AFFIDAVIT

Law Offices
WEEKES & CANDLER
Decatur, Georgia

March 9th, 1951.

Mr. Paul Chipman,
International Assn. of Machinists,
45 Third St. NE,
Atlanta, Ga.

Dear Paul:

In re: The Warren Co., Inc.,
Atlanta, Georgia.

Receipt is acknowledged of your letter of March 5th, 1951, suggesting a conference between you and the management on March 17th at 10 a.m. This falls on next Saturday. Our plant is usually closed at that time and I prefer that some other day be fixed. The following week I am engaged in the City Court of Decatur, but thereafter we will be glad to meet with you. We suggest that the time be fixed for some other day besides Saturday.

With kindest personal regards, I am

Sincerely,

Weekes & Candler.
By (S.) JOHN WESLEY WEEKES.

43 EXHIBIT 11 TO AFFIDAVIT

March 21, 1951.

Subj.: The Warren Company, Inc.,
Atlanta, Georgia.
Case No. 10-CA-622.

Hon. John Wesley Weekes,
Counsel, The Warren Company, Inc.,
P.O. Box 250,
Decatur, Georgia.

Dear Sir:

This is to acknowledge receipt of and thank you for your letter of March 9, 1951, advising that you preferred some date other than Saturday, March 17, for conference between representatives of the International Association of Machinists and the above-named employer.

I proposed a Saturday meeting inasmuch as you appear to be engaged in the Courts on other week days, and I note that you state you will be so engaged the week of March 19th.

We stand ready to meet with you at any time and Place within the limits of the cities of Atlanta or Decatur, Georgia, even on a Sunday, if you are so engaged as to prevent you meeting on week days.

We will arrange to meet you as per your letter on any or every day the week of March 26. In event I am out of the city Grand Lodge Representative Jack H. Crunk will meet with you if you will advise us either by mail or at Phone Number Vernon 0855.

You previously indicated that if you could not accept our proposed agreement that you would submit a counter proposal. We have not as yet received such counter proposal. We would, if you are going to submit such, appreciate its submission at once.

Very truly yours,

(S.) PAUL CHIPMAN,
Grand Lodge Representative.

PC/d

44 EXHIBIT 12 TO AFFIDAVIT

Law Offices
WEEKES & CANDLER
Decatur, Georgia

John Wesley Weekes
Charles Murphey Candler, Jr.

March 22nd 1951

Mr. Paul Chipman
Grand Lodge Representative
International Association of Mach.
45 Third St. NE., Suite 3
Atlanta 5, Georgia

Dear Paul:

In re: WARREN CO., INC.
Atlanta, Ga.

Receipt is acknowledged of your letter of March 21st, stating that the Union stood ready to have further bargaining conference with the above Company. You mentioned the week of March 26th, but I find that during that week I will be in the State of Texas. After my return I will be glad to arrange a conference.

With kindest regards, I am,

Sincerely,

WEEKES & CANDLER,
By: (S.) JOHN WESLEY WEEKES.
(Attorneys for: the Warren Co.)

w.d.

45 EXHIBIT 13 TO AFFIDAVIT

March 23, 1951

Subj: The Warren Co., Inc.,
Atlanta, Georgia

Case No. 10-CA-622

The Warren Company, Inc.,
905 Memorial Drive, S. W.,
Atlanta, Georgia

GENTLEMEN:

Since receipt of copy of the Decision and Order of the National Labor Relations Board in subject case issued on June 30, 1950 we have by phone and by letter repeatedly requested conferences with your delegated Counsel for conferences to bargain with you as directed in said Order.

On September 8, 1950 we met with your Counsel John Wesley

Weekes and submitted a proposed agreement covering the bargaining unit found by said Board to be an appropriate one in above captioned case. Mr. Weekes indicated at that time that if you could not agree to that proposed agreement that you would submit a counter-proposal. To date we have not received such counter-proposal. On November 29, 1950 and on March 5, 1951 we again requested Mr. Weekes to meet with us.

Under date of March 9, 1951 Mr. Weekes advised that he could not meet with us for bargaining purposes during the week of March 12, 1951 or March 19, 1951, but would meet with us during the week of March 26, 1951.

On March 21, 1951 by letter we advised Mr. Weekes that we stood ready to meet with you at any time and place within the limits of Atlanta or Decatur, Georgia, even on a Sunday, if he was engaged so as to prevent you meeting on week days, and we agreed to meet you as per his letter on any or every day the week of March 26. I also requested [again] that if you did not accept our proposed agreement that you submit a counter-proposal.

I am today in receipt of letter of Mr. Weekes, that you again refuse to meet with us, *at the time he agreed to do so*, as he, although having previously, and definitely agreed to meet with us during the week of March 26, 1951, has made some later commitment, or determined to be in the State of Texas during that week. We stand ready to have one of our Texas representatives meet you in Texas if you will advise date, time and place you will do so.

It is therefore now necessary that I request that you designate a representative:

1. That can *and will* meet with us and bargain in good faith as required by the said Order; and

2. Who will have the authority to negotiate to a conclusion, and in good faith.

We feel that we have dragged along in this matter as far as we can in seeking to meet with Mr. Weekes, and now, after having accepted a date and time set by him at his convenience, finding that he again fails to meet with us, that we must make the request herein.

Thanking you to advise by return mail as to place, time and date that you will have your representative meet with us during the week of March 26, 1951 and looking forward to a mutually amicable future relationship, I am

Very truly yours,

(S.) PAUL CHIPMAN,
Grand Lodge Representative.

PC:cj

cc: NLRB (3)
Registered Mail
Return Receipt Requested

47 EXHIBIT 14 TO AFFIDAVIT

April 9th 1951.

Mr. Paul Chipman
Int. Assn. of Mach.
45—3rd St. NE
Atlanta, Ga.

Dear Paul:

Re: The Warren Co. Inc., Atlanta, Ga.

You cannot imagine what a humiliating experience I had when my client, The Warren Company, received your letter of March 23rd, wherein you inferred that I had been derelict in my duties in meeting with you as the designated agent of the employees of the Warren Company. Surely you couldn't have been serious in the inference that I had been giving you the run-around. You will recall that last year, and particularly last fall, you were out of Atlanta a great deal of the time and our first two or three conferences were fixed at your convenience whenever you might be in Atlanta.

It is true that I have had to cancel the last one or two conferences planned, since other engagements carried me out of the city. However, you have now caused my client to look on me with suspicion and to fear that I am lazy and inattentive to his affairs. Surely such an impression would have been furthermost from your mind, because you know that I am always available and eager to do business with you.

I have been in Texas and in Washington for the past two weeks. If you find that your calendar will permit you to meet on Friday, April 27th, at 11 o'clock, in your offices, we will plan to be with you at that time. Please advise me if this date and hour is agreeable with you.

With kindest personal regards, I am,

Sincerely yours,

WEEKES & CANDLER,
By: (S.) JOHN WESLEY WEEKES.

w/d
cc to: Mr. Clarence Musser
N.L.R.B. Atlanta

48 EXHIBIT 15 TO AFFIDAVIT

April 16, 1951

Subj: The Warren Company, Inc.
Atlanta, Georgia DL46

Case No. 10-CA-622

Hon. John Wesley Weekes,
Counsel, The Warren Co., Inc.
P. O. Box 250
Decatur, Georgia

Dear Sir:

In reply to your letter of April 9, 1951 advising that you will meet with us on Friday, April 27, 1951 at 11 o'clock, A. M. in our offices at 45-Third Street, N. E., will advise the date, time and place are agreeable to us.

I request that you have some representative of the Employer present authorized to negotiate to a conclusion.

Please bring with you a list of the current wage rates and classifications, and number employed in each classification within the bargaining unit if any changes have occurred therein on or since August 1, 1950.

It will be appreciated if you can arrange to remain in, or continue from day to day, conference until we can conclude this matter.

Yours very truly,

(S.) PAUL CHIPMAN,
Grand Lodge Representative.

cc: NLRB Att: Musser

49 EXHIBIT 16 TO AFFIDAVIT

Law Offices
WEEKES & CANDLER
Decatur, Georgia

John Wesley Weekes
Charles Murphey Candler, Jr.

April 27th 1951

Mr. Paul Chipman
Grand Lodge Representative
International Ass'n. of Mach.
45 Third St. Northeast, Suite 3
Atlanta 5, Georgia

Dear Paul:

In re: The Warren Co.

In accordance with your request, I enclose herewith the job classification and wage scale within the bargaining unit.

I regret that circumstances prevented our meeting today, but I trust that we will be able to get together sometimes next week.

With kindest regards, I am,

Sincerely,

WEEKES & CANDLER.
By (S.) JOHN WESLEY WEEKES.

w.d.
encl.

50 EXHIBIT 17 TO AFFIDAVIT

Atlanta 5, Georgia
May 12, 1951

Sub: The Warren Company, Inc.,
Atlanta, Georgia
Case No. 10-CA-622

Hon. John Wesley Weekes,
Counsel, The Warren Co., Inc.,
P. O. Box 250,
Decatur, Georgia

Dear Sir:

In reference to subject case and your phone call on April 27, 1951 again advising that you could not meet with the International Association of Machinists by reason of the Employer's representative being out of the city will advise that we have a rep-

resentative ready to meet with you at any time either in your office, the office of the Employer or our office.

I will be available any day the week of May 14-19, 1951 in order to meet with you, and in event I am not at any time available we will have another representative available for such purpose.

It will be appreciated if your will name a time, place and date that you or the Employer, or both, will be available, and we will meet such time and place and date as will suit your convenience.

We will await your call, and stand ready to meet, as above set out.

Very truly yours,

(S.) PAUL CHIPMAN,
Grand Lodge Representative.

51 EXHIBIT 18 TO AFFIDAVIT

May 28, 1951.

Subj: The Warren Company, Inc.
Atlanta, Georgia
Case No. 10-CA-622

Hon. Jack Wesley Weekes
Counsel, The Warren Company, Inc.
P. O. Box 250
Decatur, Georgia

Dear Sir:

This is to advise that the International Association of Machinists stand ready to meet you at any time and at any place within the limits of the cities of Atlanta or Decatur, Georgia wherein respectively the Employer's plant and our office and your office are located.

Thanking you to advise time and place you will meet us, or whether you intend to or not meet with us, I am

Very truly yours,

(S.) PAUL CHIPMAN,
Grand Lodge Representative
Suite 3, 45 Third St., N. E.
Atlanta 5, Georgia
Phone VErnon 0855

PC:bm

52 EXHIBIT 19 TO AFFIDAVIT

Law Offices
WEEKES & CANDLER
Decatur, Georgia

June 7, 1951

Mr. Paul Chipman
Grand Lodge Representative
Suite 3, 45 Third St., N.E.
Atlanta 5, Georgia

Re: The Warren Company, Inc.

Dear Mr. Chipman:

Receipt is acknowledged of your letter of May 28th stating that the Union stands ready to meet with reference to negotiating with the above Company. I have just returned to the City and will try to arrange with you a suitable time over the telephone.

With kindest regards, I am

Yours very truly,

WEEKES & CANDLER,
By (S.) JOHN WESLEY WEEKES.

JWW:SH

53 EXHIBIT 20 TO AFFIDAVIT

July 12, 1951

Subj: The Warren Company, Inc.
Atlanta, Georgia

Hon. John Wesley Weekes
P. O. Box 250
Decatur, Georgia

Dear Sir:

I have waited patiently for more than a month for the phone call from you to arrange a conference with you as per your letter of June 7, 1951, and I am wondering if you have forgotten it.

I stand ready to meet you at your convenience. We should wind this matter up. I would not like to see the Board have to inaugurate contempt proceedings against your client in this matter.

Awaiting your call, I am

Very truly yours,

(S.) PAUL CHIPMAN,
Grand Lodge Representative.

PC/d
Blind Copy/I.P.

54 EXHIBIT 21 TO AFFIDAVIT

July 31, 1951

Subj: The Warren Company, Inc.
Atlanta, Georgia

Hon. John Wesley Weekes
P. O. Box 250
Decatur, Georgia

Dear Sir:

Will you please advise if you still represent The Warren Company, Inc., of Atlanta, Georgia, and if you still have the authority to negotiate an agreement in behalf of said Employer?

Also, please advise when we can meet with you to enter into negotiations, or if you are just stalling and have no intention of doing so.

We have been most considerate in this matter, and feel that you should either set a date and time for a conference, *and attend that conference*, or advise that you never intend doing so.

Thanking you to advise me by return mail, either of a conference date and time, or of your refusal to meet with us, I am

Very truly yours,

(S.) PAUL CHIPMAN,
Grand Lodge Representative,
45 Third St., N.E., Suite 3,
Atlanta 5, Georgia,
Phone VErnon 0855

PC:cj

72 EXHIBIT 37 TO AFFIDAVIT

January 23, 1953

Subj: The Warren Co., Inc.,
Atlanta, Georgia
Case No. 10-CA-622.

Hon. John Wesley Weekes,
Counsel, The Warren Co., Inc.,
P. O. Box 250
Decatur, Georgia.

Dear Colonel:

This is to acknowledge receipt of your letter of January 20, 1953, wherein you confirm our conference on January 19, 1953, at which time we declined to agree to a consent decertification election in view of the Orders of the National Labor Relations Board and the 5th Circuit Court of Appeals that you bargain with the Petitioner in said case upon request. This will again request that you bargain with Petitioner in accordance with the provisions of said Order.

You did not submit the original nor a copy of the alleged notification of employees to which you refer.

I note that you state that you are filing a petition for a decertification election with the Board.

The existence of a controversy in a decertification proceeding depends either (1) recognition by the employer of the union involved, or (2) its certification by the Board, as bargaining representative of the employees involved. Inasmuch as neither of these prerequisites is here present, it is my opinion that the Regional Director must promptly dismiss such a decertification petition

> After the union requested negotiations (collective bargaining) the employer was requested by employees not to enter into negotiations on their behalf. The employer refused to negotiate with the union thereafter. *The decertification petition was dismissed since the union was neither certified nor currently recognized. Matter of Coca Cola Bottling Co. of Pottsville.* 97 NLRB, No. 73.—CCH—Vol. 1, par. 2530.062.

This will confirm my having outlined to you our desire and willingness to bargain collectively and to a conclusion in good faith upon an agreement covering the substantive provisions of working conditions at the aforesaid conference.

> Where an employer has not yet complied with a court decree directing the employer to remedy its previous refusal to bargain with a union, the Board has ruled that it would thwart the policy of the Act to direct an election.

An employer is not permitted to petition for decertification.

58 EXHIBIT 24 TO AFFIDAVIT.

August 17, 1951.

Subj.: The Warren Co., Inc.,
Atlanta, Georgia.
Case No. 10-CA-622.

Hon. John Wesley Weekes,
P.O. Box 250,
Decatur, Georgia.

Dear Sir:

This will reaffirm my standing ready to meet with you as per our phone conversations on August 15 and 16, 1951, to bargain collectively as per the Order of the National Labor Relations Board in above numbered case, even to the extent of doing so while travelling in either my or your car between your appointments in Decatur, Atlanta, Marietta, etc.

I was greatly disappointed at your cancelling our scheduled conference on August 16.

I will be glad to arrange to meet you in the evenings, or on Sunday if you cannot meet me at any time during the day or week.

I have awaited your call all day today hoping that you could meet with me today or tomorrow, and I am further dissappointed in your not having called.

I have just received notice of the filing of the NLRB petition with the 5th CCA of its order in above numbered case.

If you can arrange one day to devote to a conclusion of this matter I will gladly delay other matters to meet your convenience.

Trusting that you can so arrange, and if in order to avoid interruption and to conclude the matter, if necessary, we can meet in my office, your office, the Company's office, or even on Stone Mountain, and with kind regards, I am

Very truly yours,

(S.) PAUL CHIPMAN,
Grand Lodge Representative.

PC:ej

59 EXHIBIT 25 TO AFFIDAVIT

August 15, 1952

Subj.: The Warren Co., Inc.,
Atlanta, Georgia.
Case No. 10-CA-622.

Registered Return Receipt Required.

The Hon. John Wesley Weekes,
Weekes & Candler,
P.O. Box 250,
Decatur, Georgia.

Dear Sir:

I assume that by this time you have received a copy of the decree of the United States Court of Appeals for the Fifth Circuit in above numbered case.

We have been ready and available to comply with the order of the National Labor Relations Board since its order in this matter.

Pursuant to said decree you should now have posted notices in your plant that you will bargain collectively with the I. A. of M., District Lodge No. 46, etc.

In order that we may intelligently bargain with you, we should have information below indicated. Therefore we will appreciate you advising us as follows:

Classifications of employees, the number in each of said classifications, present wage rates of each employee, any increases and amount thereof to each of said employees on or since April 20, 1951, and "fringe" conditions of employment now enjoyed by employees, including paid holidays, rest periods, hours worked per day and per week, shift differentials, pay for voting time, paid time off account death in family, insurance or other welfare plans.

We anticipate that it will take about four days to supply the requested information, and we will require one day to study that information. Allowing for other exigencies we both should be in position to bargain collectively, as provided by the said Decree of the Court in this matter on or beginning August 25, 1952, either at your office, the Company's office or our office; at 10:00 a.m.

We feel also, due to the time elapsed because of the various appeals that you have exercised since this matter started, that you should arrange to remain in continuous bargaining sessions until an agreement has been reached and executed in a written and signed document exhibiting the good faith of all concerned in complying with said Decree of the Court in this Matter.

Thanking you to cooperate with us toward concluding this Matter, I am

Very truly yours,

PC/ma (S.) PAUL CHIPMAN,
Grand Lodge Representative.
cc: NLRB (2) 45 Third Street, N.E., Suite 3,
cc: IP Atlanta 5, Georgia.
King Phones—VErnon 0855,
File (Not listed) ELgin 8148.

60 EXHIBIT 26 TO AFFIDAVIT

August 26th, 1952.

Mr. William J. Rains,
Attorney,
National Labor Relations Board,
Tenth Region,
Peachtree-Seventh Building,
50 Seventh St. NE,
Atlanta 5, Ga.

Dear Mr. Rains:

Re: The Warren Co. Case No. 10-CA-622

Receipt is acknowledged of your letter of August 15th in which you state that it is the policy of the Board that cease notices should again be posted following the Court's decree in the matter.

If you will refer to your file and to the Response to the Petition for Enforcement of the order filed with the Court, the notices required under the Board's order were posted on August 1, 1950, and remained posted for a period of sixty (60) days thereafter. The other affirmative provisions of the order were also obeyed at that time. Reference to the Response will show that the several employees were offered reinstatement, were reinstated, and received wages for the time lost. Bargaining also took place between the Respondent and the Union.

Reference to the Response, which was in no way controverted, will also show that the Union no longer represents a majority of the employees. Only two of the eight men employed at the time of certification are now employed. The present employees are not affiliated with the certified Union. While the Union's alleged loss of majority may not be urged as a defense in an enforcement proceeding, it can be urged as a defense in further proceedings. (N.L.R.B. vs. Aldora Mills.)

It now appears that the Board wishes the Respondent to do that which it has already done, in compliance with the Board's order.

Your letter was received before any request was received from the Union for the renewal of bargaining negotiations. The issue might as well be drawn at this time. You are requiring the notices to be posted. We do not believe we are required to post the same again. Full compliance with the Board's order has been set out in our Response filed with the Fifth Circuit Court of Appeals.

Permit me to cite you to several cases bearing upon this subject, in which the Court holds that *only such things, if any, as have been left undone will be required to be done. In the case of N.L.R.B. vs. Davis, 172 Fed. (2) 225, the Fifth Circuit Court ruled as follows:*

"The motion is granted with recognition of the fact that Respondent does not resist, but claims to be in compliance with the Board's order. The decree to be entered here, therefore, will provide that whatever the Respondent has already done foward compliance with the order of the Board PRIOR TO ENTRY OF THIS COURT'S DECREE WILL NOT BE REQUIRED TO BE RE-DONE, AND ONLY SUCH THINGS, IF ANY, AS HAVE BEEN LEFT UNDONE WILL BE REQUIRED TO BE DONE."

61 Again, the Fifth Circuit ruled in the case of N.L.R.B. vs. Hills Bros. Co., 161 Fed. (2) 179, as follows:

"The order of this Court, therefore, should be one directing the enforcement of the order of the Labor Board without prejudice to the right of the Respondent to show in any proceeding arising under the order of this Court the extent to which it has already complied with the Board's order and without obligation on the Respondent to again comply in the respects in which it has already complied therewith."

Before bargaining negotiations are resumed we desire a decision on the part of the Board as to whether or not they will insist on a repetition of those acts of compliance which have already been effected.

Very truly yours,

Weekes & Candler,
By (S.) JOHN WESLEY WEEKES,
(Attorneys for: The Warren Co.)

w/d

cc to: Mr. Paul Chipman,
Grand Lodge Rep.,
Dis. Lodge No. 46, Int. Assn. of Mech.,
45 3rd St. NE,
Atlanta, Ga.

62 EXHIBIT 27 TO AFFIDAVIT

August 29, 1952

Subj: The Warren Company, Inc.,
Atlanta, Georgia,

Case No. 10-CA-622.

Mr. William J. Raines,
Attorney, 10th. Region,
National Labor Relations Board,
50 Seventh Street, N. E., Room 537,
Atlanta 5, Georgia.

Dear Sir:

I am today in receipt of copy of letter dated August 26, 1952 addressed to you by Attorney John Wesley Weekes in regard to subject case, and I note the allegation "Bargaining also took place between the Respondent and the Union."

The Union, in the *one bargaining conference* we were able to get with the Employer submitted a proposed agreement to Mr. Weekes, who then requested time to study that proposal and discuss it with the Employer, and was to advise as to when we could meet for a reply to that proposal. Since that time the Employer has refused to again meet with us, and has not submitted any counter-proposal. The Employer has therefore never complied either with the Board's order, nor with the previously posted notice terms that the Employer would bargain with the Union.

Therefore, *the Employer must bargain in good faith and to a conclusion*, embodying any agreement reached in a written and executed agreement, and must now post a notice that the Employer to the effect that it will so bargain with the Union.

Very truly yours,

(S.) PAUL CHIPMAN,
Grand Lodge Representative.

PC:mv
cc: The Warren Co., Inc.
Atty. Weekes
IP
King

63 EXHIBIT 28 TO AFFIDAVIT

Sept. 2nd 1952

Hon. Wm. J. Raines
Attorney, 10th Region
National Labor Relations Board
50 Seventh St. NE., Room 537
Atlanta 5, Georgia.

Dear Mr. Raines:

Re: The Warren Co. 10-CA-622:

Receipt is acknowledged of a copy of a letter dated August 29th, 1952, addressed to you from Mr. Paul Chipman, of the Union, in the above matter.

Let me emphasize that I have never refused to bargain with the Union in this matter. In my last communication to you, I stated that bargaining in good faith has taken place. This is true. I stand ready however, to resume the negotiations, but I prefer to have a ruling from the Board as to whether or not they expect those things which have already been done to be done again in further compliance with the decree of the Court.

I have also raised the issue, both in the Response in the Fifth Circuit and in my last letter to you, that the Union no longer represents any of the employees in the unit concerned. I would like for Mr. Chipman to answer me, through you, as to whether or not he has a single member of the Union in this unit. Furthermore, I would like to know if he has a majority of the employees as members of this Union, or whether or not a majority of them have designated him recently as the bargaining agent.

This Respondent stands ready and willing to continue bargaining negotiations. We believe that we are entitled to an answer to the questions propounded.

Very truly,

WEEKES & CANDLER,
By (S.) JOHN WESLEY WEEKES,
(Attys. for: the Warren Co.)

CC TO:
Mr. Paul Chipman
Grand Lodge Rep.
45-3rd St. NE, Atlanta.

64 EXHIBIT 29 TO AFFIDAVIT

September 29, 1952.

Subj: The Warren Company,
Atlanta, Georgia

Cases No. 10-CA-622

The Honorable John Wesley Weekes,
P. O. Box 250
Decatur, Georgia

Dear Sir:

This will confirm our conversation on September 26, 1952 when we accidentally met at the Atlanta office of the National Labor Relations Board, and wherein we tentatively agreed to mutually arrange a conference on or about October 6 or 7, 1952 to negotiate an agreement as required by the Order of said Board in the above numbered case, as enforced by order of the 5th CCA.

This will also confirm my request that you supply me with a list of classifications now employed; with the wage rates of each classification and other conditions of employment such as vacations; shift differentials, rest periods, paid lunch periods, paid holidays, etc., which are necessary in order that I may intelligently discuss such an agreement with you, and which I requested in my letter to you on August 15, 1952 and to which I have to date received no answer.

I am, of course, not in agreement with your qualification as to our future conferences in effect that you will meet with us *unless* you have the opportunity to earn a large fee in some other matter. This matter has been pending several years now; and I feel that you owe it to all concerned to meet and negotiate in good faith and to a conclusion with us in this matter.

I will therefore be in position to meet with you on October 6 or 7, 1952 from 8 A. M. to 10 A. M., or from 7 P. M. to midnight.

Thanking you to advise which of these dates and time you will meet us, I am

Very truly yours,

(S.) PAUL CHIPMAN,
Grand Lodge Representative.

PC:ma
cc NLRB (2)

65 EXHIBIT 30 TO AFFIDAVIT

October 2, 1952

Mr. Paul Chipman,
Grand Lodge Representative
International Assn. of Machinists,
45 Third St., N. E.,
Suite #3
Atlanta, Ga.

Re: The Warren Company
Atlanta, Georgia

Dear Paul:

Receipt is acknowledged of your letter of September 29th. When I met you in the Board's offices, you stated you could not meet during the week of September 28th and suggested a meeting for either October 6th or 7th. At that time, I told you I would have to look at my calendar to see if any engagements were on that date.

On Monday, October 6th, I am to be in Walker County Court in LaFayette, Georgia on an Interlocutory hearing, which will probably consume the entire day. On Tuesday 7th, I am to be before the United States Circuit Court of Appeals, meeting in Atlanta at ten o'clock. I do not know if our case will be heard that day. It may go over until Wednesday. I am in position, however, to meet you on Thursday morning, October 9th at 10:30 o'clock in your office or on Friday morning, October 10th at the same hour. Please advise me if either of these dates is convenient.

You have still not answered the question propounded in my letter to the National Labor Relations Board as to whether or not any one of the employees in the designated unit is a member of your Union or has authorized your Union to act for him in matters of collective bargaining. We would like to have a definite answer on this question.

Yours very truly,

WEEKES & CANDLER,
By: (S.) JOHN WESLEY WEEKES.

JWW:SH
CC: Mr. Wm. J. Rains
National Labor Relations Board.

66 EXHIBIT 31 TO AFFIDAVIT

November 28, 1952

Subj: The Warren Co., Inc.,
Atlanta, Georgia

Case No. 10-CA-622

Hon. John Wesley Weekes
P. O. Box 250,
Decatur, Georgia

Dear Colonel:

I regret that your letter of October 2, 1952 caught me with a series of NLRB Matters in the 5th. and 15th. Regions, as well as the 10th. Region, and which, coupled with having to move our offices and the prolonged illness and which resulted in the death of my mother-in-law has prevented my answer as I could not set any definite date for a further conference.

I am now able to advise that I can meet you at either your office or ours on December 5, 6, 10-13, and I trust that either of these dates will suit you.

I have not as yet received the present list of classifications, the number of employees in each classification, or the wage rates of each employee therein. It is obvious that I must have that information if I am to be in position to intelligently negotiate an agreement for the employees in the bargaining unit in this matter. I trust this information will be supplied prior to our next conference.

I expect to be available from December 20 through 31 to devote to winding up this Matter with you.

Thanking you to advise the date, time and place for our next conference, and with kind regards, I am

Very truly yours,

PAUL CHIPMAN,
Grand Lodge Representative.

PC:ma
cc Hon. Wm. J. Rains
IP

67 EXHIBIT 32 TO AFFIDAVIT

Law Offices
WEEKES & CANDLER
Decatur, Georgia

John Wesley Weekes
Charles Murphey Candler, Jr.

Dec. 5, 1952.

Mr. Paul Chipman
Grand Lodge Representative
Int. Assn. of Machinists
Glenn Bldg.
120 Marietta St. NW
Atlanta, Ga.

Dear Mr. Chipman:

The Warren Co. Inc.
Case No. 10-CA-622

Thank you for your letter of Nov. 28th. I regret to hear of the trouble that you have experienced during the month of October.

I have been in DeKalb Superior Court all of this week and for that reason was unable to meet with you today. Tomorrow, I am leaving for Sea Island to attend a Convention of the Attorneys-General of the United States, inasmuch as I have been appointed on a Committee of five from the Georgia Bar Association to assist in the entertaining. Therefore, it seems impossible to meet with you on the date suggested.

You have not yet answered the question propounded, which I feel should be answered before bargaining negotiations are resumed. It is my contention that not a single employee in the unit involved is a member of your Union, or that a single employee in the unit involved has authorized your Union to represent it. On the contrary I am informed that none of the employees desire representation by the Union in collective bargaining matters.

With kindest regards, I am,

Very truly,

Weekes & Candler,
By (S.) JOHN WESLEY WEEKES.

68 EXHIBIT 33 TO AFFIDAVIT

December 8, 1952

Subj: The Warren Co., Inc.,
Atlanta, Georgia
Case No. 10-CA-622.

Hon. John Wesley Weekes,
Counsel, The Warren Co., Inc.,
P. O. Box 250
Decatur, Georgia

Dear Colonel:

Your letter of December 5, 1952 advising that you could not meet with the undersigned to bargain collectively as per Order in subject case on either of the dates suggested by the undersigned, i. e., December 5, 6, 10 through 13, 1952 by reason of other business did not advise a date that you could or would meet with us.

Please advise the earliest date that you will meet with us.

I can meet with you up to 1 P. M. on December 16, or all day December 15, 19, 20 and 21, 1952.

The question previously propounded by you was adjudicated in this Matter by the National Labor Relations Board and by the U. S. Circuit Court of Appeals. I do not wish to place myself in the position of violating either of the Orders of the Board or the Court.

The last sentence of your letter indicates that possibly some one has further questioned employees as to their desires as to collective bargaining. This appears to indicate that possibly a further violation of those orders has occurred on the part of the Employer or its Agents.

With kind regards, and thanking you to advise when you will meet with us, or if you do not intend to comply with said Orders then to so advise us, I am

Very truly yours,

PC:ma (S.) PAUL CHAPMAN,
Grand Lodge Representative,
616 Glenn Building,
120 Marietta Street, N. W.,
cc Hon. Wm. J. Rains-NLRB *Atlanta 3, Georgia,*
IP *Phone ALpine 3526.*

89 EXHIBIT 34 TO AFFIDAVIT

Jan. 7th, 1953

Mr. Paul Chipman
Grand Lodge Representative
International Association of Machinists
616 Glenn Building, 120 Marietta St. NW.
Atlanta 3, Georgia

Dear Paul:

Re: The Warren Co., Inc.
Case No. 10-CA-622.

I am late in acknowledging your letter of Dec. 8th with reference to further negotiations for the above company.

It was impossible for me to meet with you during the latter part of December as suggested in your letter. I will be glad to meet with you either on January 20th or 21st, in your office, at ten o'clock in the morning. Please advise if either of these dates is convenient.

I cannot meet next week because of Court engagements in New Orleans and because of other engagements here.

You have not answered my question as to whether or not you still claim to represent a majority or any substantial number of the employees in the bargaining unit. I think this is a pertinent inquiry, inasmuch as the Company has received information that none of the employees in the unit desire representation by the Union. We will discuss this matter in our meeting on either of the above two dates.

With kindest personal regards, I am

Sincerely,

CC To:
Mr. W. J. Rains
NLRB—Atlanta.

WEEKES & CANDLER,
By (S.) JOHN WESLEY WEEKES.

70 EXHIBIT 35 TO AFFIDAVIT

January 8, 1953

Subj: The Warren Co., Inc.,
Atlanta, Georgia
Case No. 10-CA-622

Hon. John Wesley Weekes,
P.O. Box 250,
Decatur, Georgia

Dear Colonel:

This is to acknowledge receipt of and thanking you for your letter of January 7, 1953 advising that you can meet with the undersigned on January 20, 1953 in our office at 10:00 A.M., and to advise that the above date, time and place are agreeable to the undersigned. I will be waiting for you.

The question as to representation of the employees in the unit found to be appropriate in subject numbered case was adjudicated in said case by NLRB and subsequently confirmed by the 5th Circuit, Court of Appeals.

Your letter indicates that the employees have been questioned as to their non-membership or membership in the Union. This is a violation, if it has occurred, of the National Labor Relations Act, in my opinion.

Please bring with you to our conference the total number of employees in each classification in the unit here found to be appropriate, their present wage rates, the amount of any increases and the basis therefor granted the employees in said unit since April 20, 1951; present vacation; waiting, call in and reporting time; sick leave; and rest period times now in effect as to said employees.

I trust that you now will be in position to continue in conference until an agreement is reached and executed, and that you will have full authority to handle this matter in good faith and to a conclusion. We request that you arrange to have that authority, or to have representatives of the Employer present who do have that authority.

With kindest regards, I am

Very truly yours,

PAUL CHIPMAN
Grand Lodge Representative

PC:ma
cc IP
Atty. Rains—NLRB

71 EXHIBIT 36 TO AFFIDAVIT

Law Offices
WEEKES & CANDLER
Decatur, Ga.

January 20, 1953.

Mr. Paul Chipman
Grand Lodge Representative
International Ass'n. of Machinists
616 Glenn Bldg., 120 Marietta St., N.W.,
Atlanta 3, Georgia

Dear Paul:

In re: *Warren Co. Inc.*, Case No. 10-CA-622

This will confirm our conference held in your office on yesterday, January 19th, 1953, at 2 P. M. I stated to you that the Company was in doubt as to the majority status of the Union, and for that reason hesitated to bargain with the Union on the matter of a contract. I stated to you that we had been informed by a large majority of the employees involved that they did not wish representation in the collective bargaining matters by any Union. This was a written notification from the employees to the effect that they did not desire representation. I inquired if you would consent to a decertification election to be held by the Board, but you declined to give this consent.

The Company still feels that they should be guided by the wishes of their employees in the matter of representation, and, following the rulings of the Fifth Circuit Court in the Aldora Mills case and others, we are filing with the Board a petition for a Decertification Election, so that this issue may be properly determined. The Company will be guided by the results of such an election.

With kindest regards, I am

Very truly,

WEEKES & CANDLER,
By (S.) JOHN WESLEY WEEKES.

cc IP

Rains-Att'y. 10th NLRB

Neither a representation nor decertification petition will be processed by the Board as long as there is an unfair practice proceeding pending.

73 It appears that the only remedy left us is to petition the Board to proceed with contempt proceedings in this Matter.

It is surprising that the Employer "feels they should be guided by the wishes of their employees" as this case is the result of their refusal to do so, even to the extent of having discharged four employees.

An election at this time would, in my opinion, be in contempt of Court.

With kind regards, I am

Very truly yours,

(S) PAUL CHIPMAN,
Grand Lodge Representative.

PC:maa
cc IP
Att'y. Rains 10th NLRB

74 EXHIBIT 38 TO AFFIDAVIT

March 9, 1953.

Subj: The Warren Co., Inc.
Atlanta, Georgia
Cases No. 10-CA-622, 10-RM-116

Hon. John Wesley Weekes,
Counsel, The Warren Co., Inc.,
P. O. Box 250,
Decatur, Georgia

Dear Colonel:

We note that on March 4, 1953 the National Labor Relations Board sustained the action of the Regional Director in his dismissal of Case No. 10-RM-116.

In view of the above action we wish to advise that we are ready and willing to meet with you to resume collective bargaining for the unit heretofore found to be appropriate in Case No. 10-CA-622.

We can meet with you at either your, the Company, or our office on March 12, 13, 17 or 18 at any hour that will suit you, and we trust that you can meet with us on either, or all, of those dates in an effort to conclude this matter.

Very truly yours,

PAUL CHIPMAN,
Grand Lodge Representative.

PC:ma
cc IP
NLRB—10—Rains (2)

75 EXHIBIT "B" TO PETITION

August 15, 1952

John Wesley Weekes, Esq.
Weekes & Candler
P. O. Box 250
Decatur, Georgia

Re: The Warren Company
Case No. 10-CA-622

Dear Mr. Weekes:

This refers to your recent telephone call to Mr. Pate, inquiring as to our position on whether it is now necessary to post the notices pursuant to the Court's decree, in view of the posting previously accomplished under the Board Order.

It appears that such posting was made on August 1, 1950, over two years ago. That notice contained the same affirmative expression relating to the respondent's willingness to bargain with the union as the notice involved in the decree, so it appeared material to ascertain whether there had been compliance in that respect since the posting date.

Our file material indicates that the union sought in vain to meet further with the respondent following the first meeting held shortly after the notice was posted, and it takes the position that the respondent has further refused to bargain since the posting date.

Considering the fact that the court has affirmatively directed the posting of the notice now, the fact that the earlier posting was accomplished before the court considered the case, and the indicated failure of compliance following the posting with respect to the bargaining provision, it is our position that the notice should be posted immediately.

Please feel free to call me at any time. I am at Extension 5355, on Elgin 3311.

Very truly yours,

(S.) WILLIAM J. RAINS,
Attorney.

WJR: er
cc: Paul Chipman, IAM
Suite 3, 45 Third Street, NE
Atlanta 5, Georgia

76-78 EXHIBIT "C" TO PETITION

September 25, 1952

Hon. John Wesley Weekes
Attorney at Law
Decatur, Georgia

Re: The Warren Company
Case No. 10-CA-622

Dear Mr. Weekes:

I have your letters of August 26 and September 2, 1952, together with Mr. Chipman's letter of August 29, 1952, to which you referred.

In your request, as I understand your letters, for a ruling from the Board as to whether or not it expects "those things which have already been done to be done again in further compliance with the decree of the Court," I feel that an unwarranted inference may have been drawn from our earlier offer to assist in effecting full compliance with the Board's order, as enforced by the Court's decree.

If you refer to that portion of the order pertaining to reinstatement and back pay, as the scope of your request might indicate, I can readily assure you we agree that there has been adequate compliance achieved in such respects.

With respect to the requirements for bargaining with the Union and for posting the notices, however, you have already been advised that we feel the earlier posting over two years ago was inadequate in view of the respondent's continuing refusal to bargain during the posting period, and thereafter, in direct disregard of the expression in the notice which represented that the respondent would bargain, as required.

Independently of all this, however, and without trying to further pursue the niceties of the issue relating to whether the notice should be posted at this time, it is quite clear that the duty to bargain with the union is not affected by what our position is or would be on the posting of the notice.

In your August 26 letter, you stated that before bargaining negotiations are resumed, you desired a decision on the part of the Board as to whether or not it will insist upon a repetition of those acts of compliance which have already been effected. The foregoing notes our position adequately, I think, but if you should desire any further clarification, please advise.

By way of emphasis, let me repeat and specifically note that the requirement for bargaining with the union stands independently of what we may think on the notice-posting issue. If, after the bargaining requirements are satisfied, the posting issue remains between us, we can seek to resolve it in the most expeditious manner available,

but if compliance with the bargaining requirement is deferred because of the posting issue, we have no alternative but to recommend appropriate further enforcement proceedings.

Very truly yours,

(S.) WILLIAM J. RAINS,
Attorney.

WJR:er
cc: Paul Chipman, IAM
Suite 3, 45 Third Street, NE
Atlanta 5, Georgia

79 In the United States Court of Appeals for the Fifth Circuit

[Title omitted]

ANSWER OF THE RESPONDENT TO THE PETITION OF THE BOARD FOR ADJUDICATION IN CIVIL CONTEMPT AND OTHER CIVIL RELIEF—Filed November 12, 1953

To the Honorable, the Judges of the United States Court of Appeals for the Fifth Circuit:

Comes now The Warren Company, Incorporated (hereinafter called the Respondent) in response to the order of this Court dated October 15th, 1953, and answers the allegations of the petition as follows:

I

Answering paragraph I of the petition this Respondent admits that the Court's order contained the paragraphs recited, but alleges that the Board has failed to set out the full order of this Court. The decree of this Court entered on August 7th, 1952, reads as follows:

"ORDERED, ADJUDGED AND DECREED that the Respondent, The Warren Company, Incorporated, Atlanta, Georgia, its officers, agents, successors and assigns shall:

80 "1. Cease and desist from:

(a) Discouraging membership in District Lodge No. 46, International Association of Machinists, or in any other labor organization of its employees, by discharging and refusing to reinstate any of its employees, by denying employment to applicants, or by discriminating in any other manner in regard to their hire and tenure of employment, or any term or condition of employment.

(b) Refusing to bargain collectively with District Lodge No. 46, International Association of Machinists, as the exclusive bargain-

ing representative of all its tool and die makers, machinists, die setters, helpers, and apprentices, excluding clerical employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act;

(c) Interrogating its employees as to union activity in the plant and their reasons for wanting a union; warning its employees that it will not have a union in its plant; and suggesting withdrawal from the aforenamed Union as a condition of employment;

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist District Lodge No. 46, International Association of Machinists, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the National Labor Relations Act, as amended.

81 2. Take the following affirmative action which the Board has found will effectuate the policies of the National Labor Relations Act:

(a) Offer to Robert Andrews, Truman Davis, Johnnie Haynes, and Edgar Hembree, in the manner set forth in the section of the Decision and Order of the Board, dated June 30, 1950, entitled, "The Remedy," immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges;

(b) Offer to John Kent, in the manner set forth in the said section of the aforesaid Decision and Order entitled, "The Remedy," the position discriminatorily denied him or a substantially equivalent position, without prejudice to his seniority or other rights and privileges;

(c) Make whole Robert Andrews, Truman Davis, Johnnie Haynes, Edgar Hembree, and John Kent, in the manner set forth in the said section of the aforesaid Decision and Order entitled, "The Remedy," for any loss of pay they may have suffered as a result of the Respondent's discrimination against them;

(d) Upon request, bargain collectively with District Lodge No. 46, International Association of Machinists, as the exclusive representative of the above-mentioned employees and, if an understanding is reached, embody such understanding in a signed agreement;

(e) Upon request, make available to the National Labor Relations Board, or its agents, for examination and copying, all pay-

roll records, social security records, time cards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the rights of reinstatement under the terms of this Decree;

82 (f) Post at its plant and offices in Atlanta, Georgia, copies of the notice attached hereto and marked "Appendix A." Copies of said notice, to be furnished by the Regional Director of the National Labor Relations Board for the Tenth Region (Atlanta, Georgia), shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(g) Notify the aforesaid Regional Director for the Tenth Region, in writing, within ten (10) days from the date of this Decree, what steps the Respondent has taken to comply herewith.

E. R. HOLMES
Judge, United States Court of Appeals for the Fifth Circuit.
ROBERT L. RUSSELL
Judge, United States Court of Appeals for the Fifth Circuit.
RICHARD T. RIVES
Judge, United States Court of Appeals for the Fifth Circuit.

Answering specifically each and every paragraph of the said decree, this Respondent says:

I (1), a: It has not discouraged membership in District Lodge No. 46, International Association of Machinists, or in any other labor organization of its employees, by discharging and refusing to reinstate any of its employees, by denying employment to applicants, or by discriminating in any other manner in regard to their hire and tenure of employment, or any other term or
83 condition of employment. Affirmatively, Respondent shows hereinafter in answering I a, b, and c that it did offer reinstatement and did reinstate certain employees and did not refuse to reinstate any of its employees as ordered by the Court.

I (1), b

Respondent shows that since the decree of this Court it has refused to bargain collectively with the Union, for the reasons more fully hereinafter set out. It shows that at the time when

response was made to the Petition for Enforcement in this Court, in its answer, Respondent set out that the Union did not then and never had represented a majority of its employees. Respondent shows hereinafter that five out of the six employees in the bargaining unit in writing have repudiated the Union and requested this Respondent not to deal with it as the bargaining agent.

I (1) c

Respondent denies that it has interrogated its employees as to union activity or has in any manner violated this section of the decree.

I (1) d

Respondent denies that it has interfered with the right of its employees to self-organization and denies that it has violated this section of the Court's decree.

I (2) a, b, c

Respondent shows that even prior to the decree of this Court, as set forth in paragraph 3 of its Response filed with the Court in September, 1951, that it had complied with the Board's order by offering reinstatement to the employees named therein; that it had paid to the employee Haynes the sum of $925.28; to Davis the sum of $234.43; and to Andrews the sum of $34.48; to
84 Hembree the sum of $887.23. All of these payments are shown by photostatic copy of the checks attached to the Response submitted to this Court in September, 1951. The offers of reinstatement were made on July 25th, 1950, and the employees were reinstated. Reimbursement of the back wages was made on March 21, 1951, in compliance with the Board's order prior to the decree of this Court.

I (2) d

As shown hereinbefore and hereinafter Respondent has refused to bargain collectively with the Union because it did not represent a majority of the employees.

I (2) e

Respondent, prior to the decree of this Court, had made available to the Board for examination all records necessary to the analysis of the amounts of back pay due and the rights of reinstatement. The awards of back pay were submitted through the Board and approved by its agent.

I (2) f

Respondent shows that as shown in its Response filed with this Court in September 1951, on pages 6 and 7, it had already posted

the notices in its plant for the required period of time; that since the Court's decree it has not again posted said notices because of the ruling of this Court, in N.L.R.B. *v.* Hills Bros., 161 Fed. (2) 179, wherein this Court held that those things which had already been done in compliance with the Board's order need not be done again. The Board has insisted that the notices be again posted after the Court's decree, but this Respondent has insisted as shown in the exhibits attached to the petition of the Board that, having already complied with this portion of the Board's order,
85 prior to the Court's decree, that it was unnecessary again to post such notices.

I (2) g

Respondent respectfully refers the Court to page 6 of its Response filed in September 1951 with this Court and shows that the Regional Director was advised that the notices had been posted.

II

Respondent admits that the decree has been in full force and effect since its entry and Respondent has had knowledge of its terms.

III

Answering paragraph 3 of the said petition, Respondent alleges that it has not bargained with the union because it did not represent a majority or any of its employees in its plant; that five out of the six employees repudiated the Union and requested Respondent to refuse to recognize the Union as their bargaining agent; that Respondent, as shown hereinafter, sought the processes of the Board for the determination of the true bargaining agent, but such processes were refused this Respondent, that it believes it has followed the law in refusing to deal with an agent that is not in fact or in truth the agent for any of its employees; that it has repeatedly requested the Union to prove its majority status or to consent to a decertification election, but these requests were refused by the Union and by the Board.

III (1)

Answering said paragraph, Respondent admits that it refused to recognize the Union on November 20, 1948, but requested that the majority status be proved through a Board conducted elec-
86 tion; that on November 23, 1948, the Union filed a petition with the Board asking certification as bargaining agent; that on Jan. 6, 1949, the Union and the Respondent entered into a consent agreement for an election to be held to determine the bargaining agent; that before the election could be held on Jan. 14, 1949, as agreed upon, the Union filed charges of unfair practices against this

Respondent, said alleged unfair practices having taken place on or about Nov. 9, 10 and 11, 1948, prior to the Union's petition for certification and prior to the consent agreement of Jan. 6, 1949, for an election.

The election was abandoned, the Board ordered a hearing on the unfair practices charges filed by the Union, and the same was held before a Trial Examiner on Nov. 22, 1949. On June 30, 1950, the Board issued its order recognizing the Union on the basis that the Company had depleted the ranks of the Union by the discharge of the several employees. The Respondent reinstated these employees in compliance with the Board's order.

III (2)

Respondent admits this paragraph of the petition.

III (3)

Respondent admits this paragraph of the petition.

III (4)

Respondent admits this paragraph of the petition.

III (5)

Respondent admits this paragraph of the petition.

III (6)

Respondent admits this paragraph of the petition.

87 III (7) a

Respondent admits this paragraph of the petition.

III (7) b

Respondent admits the allegations contained in said paragraph, but denies the conclusions of law and fact drawn by the petitioner. Respondent will show that under the decree of this Court and under the decisions of this and other Courts is not required to bargain with a Union which does not represent the employees in its plant; that it had remedied its alleged unlawful practices by the reinstatement of the employees named in the Board's complaint; that it had affirmative proof that the Union did not represent the employees; as will be shown by photostatic copies attached to this answer.

III (1) c, d, e, f, g, h, i, and j.

The above paragraphs are admitted except for the conclusions of law drawn therein. Respondent shows that the Regional Director of the Board did, on January 27, 1953, dismiss the respond-

ent's petition for an election and that the Board sustained the Regional Director's dismissal; but that it this was contrary to law and that the orderly processes of a Board-conducted election for a fair determination of the bargaining agent has always been denied this Respondent throughout these proceedings.

III(8)

This paragraph is admitted by this Respondent.

IV

Respondent denies that it has failed to post the notices required under the Board's order. Respondent refers to its Response filed in September, 1951, with this Court, paragraphs 6 and 7, and
88 affirmatively shows that said notices have been posted. It admits that no further notices have been posted, but alleges that full compliance with the Court's decree had already been effected prior to the entrance of the decree.

V

This Respondent denies that it has in any manner violated this Court's decree.

VI

Further answering said petition this Respondent alleges as follows: That the Union on Nov. 23, 1948, petitioner the National Labor Relations Board to be certified as the representative of all tool and die makers, machinists, and die setters in Respondent's plant; that thereafter, on January 6, 1949, Respondent consented to an election to be held on January 14, 1949; that thereafter the Union withdrew its petition for an election and on February 9, 1949, filed with the Board its charges against this Respondent, alleging that Respondent had interfered with the organization of the employees and that it had discriminatorily discharged four employees and refused employment to one other because of Union activities. As shown in Vol. I Transcript of Record previously filed with this Court in the Enforcement Proceedings a hearing was held before a Trial Examiner of the Board on Nov. 22, 1949; that the Trial Examiner issued his Intermediate Report recommending the reinstatement of the employees named, recommending that the Union be recognized as the bargaining agent, and recommending that a notice be posted in the plant on the part of the Respondent stating that it would not engage in unlawful activities. Exceptions were filed by the Respondent with the Board, and the Board issued its directive on June 30, 1950. On July 25, 1950, as shown on pages 9,
89 10 11 and 12 of the Response filed with this Court in September, 1951, the employees named were offered reinstate-

ment; the notice to the employees was posted on August 1, 1950, and remain posted for a period of sixty (60) days thereafter; as shown on pages 13 through 16 of the Response, the back-pay awarded by the Board was paid to the employees named; the Respondent complied with every portion of the Board's decree except that it did not bargain to a conclusion with the Union. It did meet with the Union and discussed the possibility of a contract. At all times Respondent was in doubt that the Union represented a majority of its employees, and so stated to this Court in its Response to the Petition for Enforcement. The Board on August 27, 1951, petitioned this Court for an enforcement of its order. On June 24th, 1952, this Court rendered its decision as follows:

"RIVES, *Circuit Judge*: This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act as amended, for enforcement of its order issued against respondent following proceedings under Section 10 of the Act. The Board's decision and order are reported at 90 N.L.R.B. 689.

With commendable candor respondent's counsel has stated its position as follows:

'We have controverted the findings of fact of the Board in our Response, but in all fairness to this Court we are constrained to admit that there is sufficient evidence, even though disputed, upon which to base the Board's order.

Our contention, therefore, is that the Board's order should not be enforced by this Court, *not because of the insufficiency of evidence, but because the order has been obeyed in all of its provisions, and, because of changed conditions not attributable to Respondent's conduct, the Union does not now represent a majority in this small unit and Respondent should not be required to bargain further with it.*' (emphasis the Respondent's.)

The Supreme Court has expressly ruled that compliance with an order of the Board does not affect the right to enforcement, pointing out that the legislative history of the Act indicates that the framers of the Act contemplated "that there be 'immediately available to the Board an existing court decree to serve as a basis for contempt proceedings,' in the event a renewal of the unfair practice occurs after the enforcement order." N.L.R.B. vs. Mexia Textile Mills, 339 U. S. 563, 567, 659.

The same decision (see page 568) settles the doctrine *that the Union's alleged loss of majority may not be urged as a defense in an enforcement proceeding.* See also N.L.R.B. vs. Sanson Hosiery Mills, C.A. 5, No. 13726, decided April 10, 1952; cf. N.L.R.B. vs. Aldora Mills, C.A. 5, No. 12900, decided June 6, 1952.

It results that the Board's petition is granted and its order Enforced."

Respondent shows at that time that it urged before this Court that the Union did not represent a majority of this small unit, and *that this Court held that "the alleged loss of majority could not be urged as a defense in an enforcement proceeding."*

Thereafter, as shown by the exhibits attached to the
91 petition, pages 66 and 67, the Board directed that the notices again be posted by this Respondent. Respondent refused for the reasons shown in its letter attached as exhibit 26 page 51 to the petition. In said letter of August 26th, 1952 Respondent presented proof to the Board that the notices had already been posted, and that it refused to do that which it had already done in compliance with the Board's or Court's decree. From the date of the Court's decree, this Respondent has urged with the Union and with the Board that it could not bargain with a union which did not represent its employees. Only two of the eight employed at the time of the certification by the Board are now employed by the Company. None of the present employees were affiliated with the certified union. Respondent cited to the Board the case of N.L.R.B. vs. Aldora Mills 197 Fed. (2), page 265 wherein this Court held that while the Union's alleged loss of majority could not be urged as a defense in an enforcement proceeding, it could be urged as a defense in further proceedings. Thereafter this respondent did engage in correspondence with the Union's representative and with the Board relative to bargaining conferences, but in each of these communications Respondent inquired of the Union if it represented a single employee in the bargaining unit. The union refused to answer this inquiry.

VII

Further answering this Respondent shows that it filed with the Board a petition requesting that the Board determine by an election if the Union represented a majority of its employees. Attached to such petition was a photostatic copy of a communication from its employees, dated Nov. 3, 1952, the same being signed by five out of the six employees in the bargaining unit. The communica-
92 tion read as follows, and a photostatic copy of the same is attached to this answer, marked "Exhibit A" and made a part hereof:

"November 3rd, 1952.

We the undersigned employees of the Warren Co. do not want the International Association of Machinists or any other union to represent us in the matter of collective bargaining

with our employer. We request that the union be decertified as the bargaining agent.

PERCY A. WRIGHT
E. L. REEVES
J. R. MITCHELL
P. J. WATER
C. A. SMELLEY."

Thereafter, on January 28, 1953, the Regional Director denied the Respondent's petition for an election as shown in "Exhibit B" attached hereto and made a part hereof. On January 28th, 1953, Respondent appealed to the Board to review the action of the Regional Director and to direct an election to determine the bargaining agent. Said appeal is as follows:

"January 28, 1953.

National Labor Relations Board
Washington, D. C.

RE: The Warren Co., Inc.
Case No. 10-RM-116

Gentlemen:

Representing the Warren Company, I have filed with the Regional Board a petition for investigation as to the lawful representative of the employees in matters of bargaining. As set forth in our petition to the Board, the Company was petitioned by five out of the six employees involved not to
93 recognize the Union in matters of bargaining. Therefore, being in a dilemma as to the true status of the bargaining representative, we filed the above Petition with the Regional Office.

Today we are in receipt of a copy of a registered letter to the Warren Company, dated September 27, 1952, that the Petition has been dismissed and that we have the right to have the same reviewed provided the Petition for such review is made within ten days from the date of the letter.

We feel that the Director is in error in holding that an Order to bargain is tantamount to certification and certification is a bar to a question concerning representation for at least one year. We cite the Board to the case of National Labor Relations Board vs. Aldora Mills, desided by the United States Circuit Court of Appeals, Fifth Circuit, and reported in 197 Fed. (2d), 265 as our authority in pressing the contention that the Board should investigate and determine the wishes of the employees. The law does not contemplate that an employer

bargain with a representative who is not the true and lawful representative of the employees.

Respectfully submitted,

WEEKES & CANDLER,
By JOHN WESLEY WEEKES,
Attorneys for The Warren Company, Inc.

JWW:SH
CC:
District Lodge No. 46
616 Glenn Bldg., Atlanta, Ga.
Mr. John C. Getreu, Regional Director
National Labor Relations Board
Atlanta, Georgia."

94 Thereafter, on March 4, 1953, the Board denied the appeal:

"National Labor Relations Board
Washington 25, D. C.
March 4, 1953.

John Wesley Weekes, Esq.
Weekes & Candler
Box 250
Decatur, Georgia.

RE: The Warren Company
Case No. 10-RM-116

Dear Sir:

The Board has considered your request for review of the Regional Director's refusal to issue Notice of Hearings in the above case and has decided that the Regional Director's dismissal was proper on the ground that pursuant to a Decree of the United States Court of Appeals entered on August 7, 1952, enforcing the Board's Order in case No. 10-CA-622, the Employer is obligated to bargain with Lodge No. 46, International Association of Machinists, AFL, for the employees described in the instant petition and if an understanding is reached, to embody such understanding in a written agreement.

Very truly yours,

GEORGE A. LEET,
Assistant Executive Secretary.

CC:
John C. Getreu
Director—Region 10
Paul C. Chipman
International Association of Machinists
616 Glenn Building
120 Marietta St., N. W.
Atlanta 3, Georgia."

95. Respondent shows that it has complied with every portion of this Court's decree with the exception of that portion which directs it to bargain with the Union. In its decision this Court stated that the "Union's alleged loss of majority may not be urged as a defense in an enforcement proceeding."

Following this Court's decree this Respondent has exhausted every recourse for a fair determination by the Board of the majority status of the Union. It has been denied these orderly processes. It has shown to the Board and to this Court that five out of six employees have requested that the Union be not recognized. It has shown that the Union has failed to answer the very pertinent inquiry of the Respondent as to whether or not it represented a single employee in the bargaining unit. This Respondent does not believe that this Court would require it to bargain with a Union which does not represent the employees. For this reason it has failed to bargain collectively with the Union involved. No election has ever been held in the unit. No fair determination has ever been made of the majority status of the Union.

This Respondent shows that it has meticulously obeyed the decree of this Court and shows that it has not committed an unlawful act by refusing to bargain with a Union which represents none of its employees. A similar course of conduct as that followed by this Respondent has been approved by this Court in the case of N.L.R.B. vs. Aldora Mills (on contempt) 197 Fed. (2d) 265; and by the 6th Circuit in the case of Mid-Continent Petroleum Corp. vs. N.L.R.B. 204 Fed. (2d) 613, certiorari denied by the Supreme Court on October 19, 1953.

96. WHEREFORE, having fully answered the petition for adjudication in contempt, this Respondent prays that it be absolved of all charges of contempt, and that the Petition be dismissed.

Respectfully submitted,

The Warren Company, Incorporated
By JOHN WESLEY WEEKES
and MURPHEY CANDLER, JR.
Attorneys of the Firm of Weekes & Candler

John Wesley Weekes
Murphey Candler, Jr.
P.O. Box 250,
Decatur, Georgia

Duly sworn to by J. D. Harris, jurat omitted in printing.

97 Certificate

I, JOHN WESLEY WEEKES, of counsel for The Warren Company, Incorporated, hereby certify that I have today forwarded a copy of this answer to the National Labor Relations Board in Washington, D. C., sending the same to: Winthrop A. Johns, Ass't General Counsel.

Nov.——1953.

JOHN WESLEY WEEKES
Of the Firm of Weekes & Candler,
Attorneys

98 EXHIBIT "A" TO ANSWER

Nov. 3rd, 1952

We The undersigned Employees of the Warren Co. do not want the International Association of Machinists or any other union to represent us in the matter of collective bargaining with our Employer. We request that the unions be Decertified as the foregoing agent.

PERCY A. WRIGHT
E. L. REAVES
J. R. MITCHELL
P. J. WATES
C. A. SMELLEY

99 EXHIBIT "B" TO ANSWER

"National Labor Relations Board
Tenth Region
Room 537, Peachtree-Seventh Bldg.
50 Seventh Street, Northeast
Atlanta 5, Georgia

January 28, 1953.

Registered Return
Receipt Requested
The Warren Company, Incorporated
905 Memorial Drive, S.E.
Atlanta, Georgia.

Re: The Warren Company, Incorporated

Case No. 10-RM-116:

The Petition of Certification of representatives filed by you was received on January 27th and docketed under the above-captioned case number.

It does not appear that further proceedings are warranted inasmuch as on August 7, 1952, the Employer was ordered by the

United States Court of Appeals to bargain with International Association of Machinists, District Lodge No. 46. The Board has held that an order to bargain is tantamount to certification and a certification is a bar to a question concerning representation for at least one year. I am, therefore, dismissing the Petition in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing a request for such a review with the National Labor Relations Board, Washington 25, D. C., with a copy to me and to the interested parties. The request should be filed within ten (10) days from
100 the date of this letter, except that the Board may, upon good cause shown, grant special permission for a longer period within which to file.

This letter supersedes letter issued on January 27, 1953; but inadvertently dated September 27, 1952.

Very Truly;

JOHN C. GETREU,
Regional Director.

CC:

District Lodge No. 46
International Association of Machinists
616 Glenn Building, Atlanta, Ga.
John Wesley Weekes, Attorney
P O. Box 250, Decatur, Georgia.
National Labor Relations Board
Washington 25, D. C."

101. United States Court of Appeals for the Fifth Circuit

[Title omitted]

[File endorsement omitted]

PETITIONER'S REPLY TO RESPONDENT'S ANSWER —Filed November 28, 1953

Comes now the National Labor Relations Board (herein called the Board), and for this, its reply to respondent's Answer, reiterates the allegations of its petition herein and further alleges, upon information and belief, as follows:

1. In reply to the allegations in paragraphs I (1) (a), I (1) (c), I (1) (d), I (2) (a, b, c), and I (2) (e) of the Answer, the Board denies that such allegations are material, since no claim has been

made that respondent has failed to comply with any provisions of the decree of this Court except those relating to collective bargaining and the posting of notices.

2. With respect to the allegations that "the Union did not then and never had represented a majority of its employees" and that "five out of the six employees in the bargaining unit in writing have repudiated the Union and requested this Respondent not to deal with it as the bargaining agent" contained in paragraph I (1) (b) of the Answer, and similar allegations contained in paragraphs I (2) (d), III, III (7) (b), VI, VII and VIII of the Answer, the Board denies that the Union "never" represented or did not at the times mentioned by respondent represent respondent's employees in the bargaining unit, and the Board affirmatively asserts that it
102 was determined by the Board and this Court in the original proceedings herein that, prior to November 20, 1948, the date of respondent's original refusal to bargain with the Union, a majority of respondent's employees in the bargaining unit had designated the Union to represent them for purposes of collective bargaining and, the Board shows, that at all times since that date the Union has remained the designated statutory bargaining representative of said employees since at all times after that date respondent has failed and refused to bargain in good faith with the Union as the representative of such employees. With respect to the other allegations described above in this paragraph, the Board denies knowledge or information sufficient to form a belief concerning how many employees remain in the bargaining unit or whether any of them have repudiated the Union, or requested respondent not to recognize or deal with it, or signed a statement to that effect. Further, the Board denies that such allegations, if true, are material, since the Union, notwithstanding such alleged loss of majority or repudiation, continues to be the designated statutory bargaining representative of the employees in the bargaining unit.

3. In reply to the allegation that the Union "did not represent a majority of respondent's employees" contained in paragraph I (2) (d) of the Answer, and similar allegations contained in paragraph VIII of the Answer, the Board asserts that, as set forth more fully in paragraph 2 hereinabove, at all times since November 1948 the Union has remained the designated statutory bargaining representative of respondent's employees in the bargaining unit.

4. The Board denies the allegations in paragraph III of the Answer that "the processes of the Board for the determination of the true bargaining agent . . . were refused this Respondent" and similar allegations in paragraph VIII of the Answer, and shows that the Board and this Court in the original proceedings herein duly determined that a majority of respondent's employees in the

bargaining unit had designated the Union as their bargain-
103 ing representative, and that the Union was the statutory bargaining representative of such employees, and the Board shows, that at all times since then the Union has been the statutory bargaining representative of the employees in the bargaining unit because respondent has never remedied its prior unlawful refusal to bargain with the Union. As disclosed by paragraph III (7) (i) of the petition, the Regional Director and the Board, because of the above, dismissed a petition filed by respondent in January 1953 for an election.

5. With respect to the allegations in paragraph III (1) of the Answer, the Board asserts that its order directing respondent to bargain with the Union was predicated on findings that respondent, without any doubt as to the Union's majority status, discriminatorily discharged half of the employees in the bargaining unit and thereafter refused to recognize the Union as the bargaining representative of the employees in the unit. The order to bargain issued on these facts was enforced by this Court. Although respondent reinstated the discriminatorily discharged employees, it has never remedied its unlawful refusal to recognize and bargain with the Union.

6. The Board denies the allegations contained in paragraph III (7) (b) of the Answer that respondent "under the decree of this Court and under the decisions of this and other courts is not required to bargain with" the Union and that it has "remedied its . . . unlawful practices by the reinstatement of the employees named in the Board's complaint", since respondent never has remedied its refusal to recognize and bargain with the Union by good faith bargaining.

7. Replying to paragraph III (7) (c, d, e, f, g, h, i, and j) of the Answer the Board denies that the action of the Regional Director in dismissing respondent's petition and the Board's action in sustaining such dismissal were "contrary to law" and that "the orderly processes of a Board-conducted election for fair determination of the bargaining agent have been denied respondent throughout these proceedings". Affirmatively, the Board alleges,
104 as more fully set forth in paragraph 4 hereinabove, that such dismissal and the Board's action in sustaining the dismissal were proper and lawful under the circumstances herein.

8. With respect to the allegations contained in paragraph VI of the Answer that respondent "complied with every portion of the Board's decree except that it did not bargain to a conclusion with the Union. It did meet with the Union and discussed the possibility of a contract", the Board denies that respondent met with the Union or discussed contract terms with it other than as shown in paragraphs III (3) and III (8) of the petition herein.

9. The Board denies the allegation contained in the last sentence of paragraph VI of the Answer that the Union "refused to answer" respondent's inquiries "if it represented a single employee in the bargaining unit" and the similar allegation contained in paragraph VIII of the Answer. Affirmatively, the Board shows that, as shown in paragraph III (7) (g) of its petition herein and in Exhibits 33 and 35 attached to said petition, the Union pointed out in its letters to respondent that the question of representation of employees in the unit had been adjudicated by the Board and this Court in the proceedings herein.

WHEREFORE, it is respectfully submitted that the Court should adjudge respondent in civil contempt of court, should require respondent to purge itself of the civil contempt by taking the action suggested in the prayers attached to the petition, should institute *sua sponte*, criminal contempt of court proceedings against
105 respondent as prayed in the petition, should adjudge respondent in criminal contempt of court and punish it therefor by fine or imprisonment or both in such manner as this Court may deem just and proper.

Dated at Washington, D. C., this 24th day of November 1953.

National Labor Relations Board
By (S.) WINTHROP A. JOHNS,
Assistant General Counsel.

(S.) GEORGE J. BOTT
General Counsel
DAVID P. FINDLING
Associate General Counsel
WINTHROP A. JOHNS,
Assistant General Counsel
JULIUS G. SEROT
Attorney
CHARLES M. HENDERSON
Attorney
National Labor Relations Board,
Washington 25, D. C.

106 Duly sworn to by Winthrop A. Johns, jurat omitted in printing.

107 In United States Court of Appeals

[Title omitted]

ARGUMENT AND SUBMISSION ON PETITION FOR CONTEMPT—May ■, 1954

On this day this cause was called, and after argument by Winthrop A. Johns, Esq., Assistant General Counsel, National Labor Relations Board, for petitioner, and John Wesley Weekes, Esq., for respondent, was submitted to the Court.

108 In the United States Court of Appeals for the Fifth Circuit

No. 13772

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

versus

THE WARREN COMPANY, INCORPORATED, RESPONDENT.

OPINION ON PETITION FOR ADJUDICATION IN CIVIL CONTEMPT AND FOR OTHER CIVIL RELIEF; AND REQUEST FOR INSTITUTION OF ADJUDICATION IN, AND PUNISHMENT FOR CRIMINAL CONTEMPT.—June 30, 1954.

Before Hutcheson, Chief Judge, Holmes, Circuit Judge and Wright, District Judge.

HUTCHESON, *Chief Judge*: Filed by the board to have respondent adjudged in civil contempt of our decree in cause No. 13772 on the docket of this Court, and also to suggest that it be proceeded against as for criminal contempt, the petition for the adjudication in civil contempt alleged that respondent has failed and
109 refused, and continues to fail and refuse, to comply with paragraphs 1(b) and 2(d) of the decree.[1]

[1] Requiring respondent to:

"1. Cease and desist from:

* * *

"(b) Refusing to bargain collectively with District Lodge No. 46, International Association of Machinists, as the exclusive bargaining representative of all its tool and die makers, machinists, die setters, helpers, and apprentices, excluding clerical employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act;

"2. Take the following affirmative action which the Board

In reply, respondent, setting out the whole of our decree with its various prohibitions and injunctions, alleged that even before its entry it had complied, and is now in compliance with, each and every one of its provisions, including offering to reinstate, and reinstating, the five named employees and paying them the amounts determined to be due them, except that since the decree of this Court it has refused, and is refusing, to bargain collectively with the union as bargaining agent of its employees for the reasons set out in its answer as follows. The union does not represent and has not for a long time represented its employees as bargaining agent. As early as Nov. 3, 1952, long after respondent had reinstated and reimbursed its employees, respondent received a communication[2] from five of the six employees in the unit affected, stating that the union did not represent them and requesting that it be decertified, and respondent, finding itself unable to prevail upon the union to furnish it countervailing evidence or to consent to an election, on January 27th, filed a petition with the regional board for an election, attaching to it the said request of its employees.

Thereafter and within ten days, it petitioned the board for a review, citing our case of *N.L.R.B. vs. Aldora Mills*, 197 F(2) 265, and stating in part: "The law does not contemplate that an employer bargain with a representative who is not the true and lawful representative of the employees."

---

has found will effectuate the policies of the National Labor Relations Act:

* * *

"(d) Upon request, bargain collectively with District Lodge No. 46, International Association of Machinists, as the exclusive representative of the above-mentioned employees and, if an understanding is reached, embody such understanding in a signed agreement;"

[2] Nov. 3rd, 1952

"We the undersigned employees of the Warren Co. do not want the International Association of Machinists or any other union to represent us in the matter of collective bargaining with our employer. We request that the union be decertified as the bargaining agent.

Percy A. Wright
E. L. Reives
J. R. Mitchell
P. J. Water
C. A. Smelley."

On March 4, 1953, the board, in a letter[3] to respondent's counsel, denied the appeal.

111 On the basis of this showing, respondent asserts: that following this court's decree, it has exhausted every recourse for a fair determination by the board of the majority status of the union; that it has been denied these orderly processes; and that it does not believe that this court would wish or require it to bargain with the union which does not represent, and has not for a long time represented, the employees as bargaining agent. For this reason and for this reason alone, and not because it is contemptuous of this court's decree, it has failed to bargain collectively with the union.

The board, in its reply to respondent's answer, does not deny or otherwise put in issue the allegations of fact in it. It merely avers that these facts are not material. As the board sees it, the only material facts are these: the board determined that the respondent was guilty of unfair labor practices and ordered that it bargain with the union as representative and bargaining agent for the unit; the court granted the board's petition for enforcement of that order and ordered it enforced; and the respondent admitted that, though board and court have so ordered, it refuses to do so. On the basis of these admitted facts, the board insists that respondent stands without defense and, as matter of law, must be adjudged in civil contempt and required to bargain, and that the court should also proceed in criminal contempt and punish respondent by fine or imprisonment or both.

We cannot at all agree with these views. On the contrary, we think the facts alleged by respondent and in effect admitted by petitioner make it clear that the charge of criminal contempt, that is of wilful and deliberate defiance of our decree, is wholly without legal or factual basis, and that, on the issue of civil contempt, the facts make strongly for, if they do not in fact and in law compel, a negative answer to the ques-

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[3] The letter is as follows:

"The Board has considered your request for review of the Regional Director's refusal to issue Notice of Hearings in the above case and has decided that the Regional Director's dismissal was proper on the ground that pursuant to a Decree of the United States Court of Appeals entered on August 7, 1952, enforcing the Board's Order in Case No. 10-CA-622, the Employer is obligated to bargain with Lodge No. 46, International Association of Machinists, AFL, for the employees described in the instant petition and if an understanding is reached, to embody such understanding in a written agreement."

tion this proceeding presents, and thus make out a complete defense to the charge.

This question is, must respondent be adjudged in civil contempt of our order because, under the facts of this case detailed in its answer, it refuses to bargain with a union which does not now represent, and has not for a long time represented, its employees and which they have requested respondent in writing not to recognize as bargaining agent for them.

The board's position on the question shortly stated is that since the board directed the respondent to bargain with the union as the representative of the unit in question, and we directed the enforcement of the board's order, its and our order fixed the status of the union as bargaining representative of the unit and required the respondent to bargain indefinitely with it, even though, without fault on respondent's part, the membership of the unit has changed its composition so that its members are no longer members of the union, and, in addition, five out of six of the employees constituting the unit have filed a written request to respondent not to bargain with it as their representative. This position is apparently based in part upon the board's idea that after it has made
113 a determination as to the bargaining agent of the employees, it is not for the employees but for it to determine who shall continue to represent them and in part upon decisions of the court that in enforcement proceedings it is not a defense that the union has lost its majority if this loss is due to the wrongful actions of the respondent.

Respondent, while conceding the rule to be as stated by the board, where the proceeding is one for enforcement of the board's order and the evidence shows that the loss of representation is due to unfair labor practices of the employer, insists that the rule does not, it cannot apply here, because (1) it is affirmatively shown that the loss of the union's position as bargaining agent is not the result of unfair labor practices but of a turn over of the employees or a change of opinion on their part, not brought about or contributed to by the employer, and (2) because this is not an enforcement but a contempt proceeding.

As it applies its argument to the undisputed facts here presented, the respondent states it thus: Granted that because of the findings of the board which were affirmed by this court, appellant had no right to defend against the enforcement proceeding on the ground that, though the contrary was found by the board, the union did not in fact represent its employees, an entirely different question is presented in this contempt proceeding. This results from the admitted facts that after the entry of the board's order and long before the entry of our decree,
114 the respondent posted the required notices, reinstated the five discharged employees with back pay and made an

offer to bargain with the union, and later, and without fault on respondent's part, the employees in the unit repudiated, and are still repudiating the union as bargaining agent.

It points to the undisputed facts of record: that before and after the entry of the decree, without fault on the part of respondent but due solely to the natural turn over among its employees, the union lost its majority and ceased to represent the unit; that based upon the written request in November of 1952 of five of the six employees then constituting the unit, the respondent in January of 1953, filed with the regional office of the board a petition requesting it to determine by an election whether the union represented a majority of the unit, and the regional director first, and the board later, denied the petition for an election.

So pointing, it insists that it is the board, and not the respondent, which is preventing the employees from choosing their own representative and forcing upon them a representative not of their own choosing, and the respondent is, therefore, not in contempt of our decree whose sole purpose was, and whose effect ought to be, to protect the employees' right of choosing their own representative and of not having one they did not choose and do not want thrust upon them. So insisting, respondent, on the basis of the many cases which it cites,[4] including our own case of Aldora Mills, *supra*, urges upon us, that in a contempt proceeding, unlike in an enforcement proceeding, the question of the reality of the claimed representation can and will be inquired into and when, as here, it appears that the enforcement of the court's decree in accordance with its terms would work a present injustice to and injury upon the employees by forcing them to accept a bargaining agent which they did not choose and do not want, the court will not, under the guise of holding respondent in contempt, force upon the employees a bargaining agent they do not want. Particularly will it not do so where it appears, as here, that the board, by refusing to consider or otherwise lend its assistance to the decertification peti-

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[4] Frank Bros. Co. v. NLRB, 321 U. S. 702; in which the court held that "The Board's order does not fix a permanent bargaining relationship without regard to new situations which may develop"; NLRB v. Aldora Mills, 197 F(2) 256, and cases cited in it; Mid-Continent Pet. Corp. v. NLRB, 204 F(2) 613; NLRB v. Inter City Adv. Co., 154 F(2) 244; NLRB v. Appalachian Elec. Power Co., 140 F(2) 217; NLRB v. Century Oxford Mfg. Corp., 140 F(2) 541; NLRB v. Mayer, 196 F(2) 286; NLRB v. Bradley Washfountain Co., 192 F(2) 144. Cf. N.L.R.B. v. Red Arrow, (5th Cir. 5-14-54).

tion, and not the respondent, is responsible for the situation which now exists.

The Board meets this argument with the countercontention that it stands, as to the decree entered in its favor, in the same case and entitled to the same extent to enforce it as written, as a private litigant who has obtained an injunctive order in its favor, and that since in such a situation the court would not reconsider the equities as between the parties to the decree, and upon that reconsideration refuse to hold the contemnor in contempt, neither will the court do so here.

116 We cannot agree with the board that the matter so stands here. Under the settled law that the remedies provided by the act are public, not private, remedies, that orders and decrees are entered not in vindication of private, but of public, rights, it is, we think, plain that the board is not entitled to a contempt order enforcing the court's decree, if, in the court's opinion, such a contempt adjudication will result in a violation of the act and of the public policy for which it stands. The considerations which underlie the holdings of the court on which the board relies, that whether enforcement of the board's order should be granted or denied is to be determined not upon new evidence but upon the record on which the board's order is based, and, therefore, a respondent may not show as a defense in an enforcement proceeding that the union has lost its majority, have no application in a contempt proceeding to which entirely different considerations apply. In such a proceeding the court determines for itself what order will best serve the public interest and at the same time vindicate its own decree, and it will not, in disregard of the plain language of the act, that employees are entitled to choose their own bargaining representative and may not have one not of their own choosing forced upon them, issue a contempt order which has the effect of doing so.

In this case it appears without dispute that after the entry of the board's order and before the entry of the enforcement decree in this case, the respondent complied fully with all the provisions of the order by reinstating and paying back wages to discharged
117 employees, by posting notices and by agreeing to bargain with the union as their representative. It further appears that, after the entry of our decree, the respondent, advised by his then employees, that they were not members of the union and that they did not wish to have the union represent them and wished it decertified, requested the board to take the proper steps to inquire into and determine the truth of the matter and the board having refused to do so, the respondent in good faith determined that it would be unlawful, unwise, and unfair for it to bargain with the union, and that it would not be contemptuous of it to refuse to bargain with it as representative of its members. Under these circum-

stances, we think that the court, instead of vindicating, would stultify, itself and its decree and do violence to the act if it ordered the employer to force upon its employees as bargaining agent a union not of their own choosing merely because some six years before the board had ordered the employer to recognize it as bargaining agent for its then employees.

We think that no case for a contempt order is made out. The petition is Denied and the contempt proceeding is Dismissed.

118 In United States Court of Appeals

No. 13772.

NATIONAL LABOR RELATIONS BOARD,

versus

THE WARREN COMPANY, INCORPORATED.

JUDGMENT—June 30, 1954.

This cause came on to be heard on the Petition of the National Labor Relations Board for Adjudication in Civil Contempt and for other Civil Relief; and Request for Institution of Adjudication in, and Punishment for Criminal Contempt, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that said petition be, and the same is hereby, denied and the contempt proceeding is dismissed.

119 In the United States Court of Appeals for the Fifth Circuit

[Title omitted]

On Petition of the National Labor Relations Board for Adjudication in Civil Contempt and for Other Civil Relief

PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR REHEARING AND MODIFICATION OF OPINION—Filed July 21, 1954

To the Honorable, the Judges of the United States Court of Appeals for the Fifth Circuit:

The National Labor Relations Board respectfully requests this Court to grant a rehearing on its decision of June 30, 1954, which denied the Board's petition that respondent be adjudged in civil contempt of Court because of its admitted refusal to bargain with the Union as required by the Court's decree of August 7, 1952, to modify its opinion in accordance with the following and to hold respondent in civil contempt as prayed in the contempt petition.

1. The Court in its decision of June 30, 1954, denying the Board's petition for adjudication in contempt, states: (a) that respondent "made an offer to bargain with the union" and "complied fully with all provisions of the order * * * by agreeing
120 to bargain with the union" (11th and 16th par., pp. 7 and 9-10 slip op.); (b) that the union's loss of majority status is "not the result of unfair labor practices" and "without fault" on respondent's part (9th, 10th, 11th, and 12th par., pp. 5-7 slip op.); and (c) that the Board takes the position that respondent is required "to bargain indefinitely" with the union (9th par., p. 5 slip op.). In making these statements, the Court, it is respectfully submitted, may have misunderstood the Board's position and overlooked certain undisputed facts.

2. With respect to the statements that respondent complied with the Court's decree by "offer[ing]" and "agreeing" to bargain with the union, respondent concedes that it never complied with the Court's bargaining order (cf. Bd. Pet., par. III (8) with Resp. Ans., p. 9; see also Resp. Ans., pp. 5, 6, 7, 14, 17). As the admitted facts show, respondent has failed and refused at all times since the union secured its majority representation to bargain collectively with the union. From November 1948, when the union secured its majority status, until after the Board's order issued in June 1950, respondent evaded even meeting with the union to bargain. After the Board's order issued, respondent posted the notice stating that it would bargain with the union and met once with the union in September 1950 to receive the union's contract proposals. However, respondent refused to discuss contract terms at this meeting and thereafter refused to meet again with the union for bargaining purposes although repeatedly requested to do so by the union. After this
121 Court's decree was issued in August 1952, respondent continued to refuse to meet and bargain with the union although repeatedly requested to do so (Bd. Pet., par. III (8); Resp. Ans., p. 9). This clearly did not constitute compliance with the bargaining order (see Bd. Memo., pp. 9-11).

3. With respect to the various statements that the union's majority loss is not attributable to unfair labor practices or to any "fault" on respondent's part, the foregoing demonstrates that respondent has never remedied its unfair labor practices by genuine collective bargaining with the union. Under such circumstances, as pointed out in our memorandum previously submitted (pp. 2-7), the loss of the union's majority status following the unfair labor practices is attributable to respondent's unremedied refusal to bargain. Respondent's claim is that it was informed by a majority of its employees in November 1952 that they did not desire the union to represent them. However, this followed 4 years of unlawful refusal on respondent's part to bargain with the union. Moreover, the alleged

repudiation of the union by the employees did not occur until it was clear that respondent also intended to disregard the bargaining directive in the Court's decree. The Court's decree was issued in August 1952. Although the union promptly requested a bargaining conference, respondent, during the 3 months between the issuance of the decree and the alleged repudiation of the union, continued its procrastination and evasion and avoided meeting with the union.

Under these circumstances, it is submitted that the Court
122 should withdraw its statement that respondent is not responsible for the union's majority loss.

4. With respect to the statement that the Board would require respondent to bargain "indefinitely" with the union, it may be that the Board failed to make its position entirely clear to the Court. The Board never contended that respondent must bargain "indefinitely" with the union; its contention was, and is that established legal precedents require respondent to remedy its unfair labor practice (the prior refusal to bargain with the union) by good faith bargaining with the union for a "reasonable" period before it may challenge the union's majority status and refuse to bargain with the union on the ground that it no longer represents the employees. (See Bd. Rep., par. 5 and 6; Bd. Memo., pp. 2-4, 10). Respondent could have met this requirement by bargaining before the decree or bargaining after the decree. However, as admitted by respondent and shown above, respondent bargained with the union neither before nor after the decree.

Conclusion

It is respectfully requested that the Court grant the rehearing herein requested, modify its opinion of June 30, 1954, in accordance with the foregoing and adjudge respondent in civil contempt of court for its admitted refusal to bargain collectively with the
123 union pursuant to the provisions of the Court decree.

George J. Bott,
General Counsel,
David P. Findling,
Associate General Counsel,
Winthrop A. Johns,
Assistant General Counsel,
Julius G. Serot,
Charles M. Henderson,
Attorneys, National Labor Relations Board.

July , 1954.

Comes now Winthrop A. Johns, Assistant General Counsel of the National Labor Relations Board, and certifies that he has read and

knows the contents of the foregoing petition and that said petition is filed in good faith and not for the purposes of delay.

WINTHROP A. JOHNS,
Assistant General Counsel,
National Labor Relations Board.

Dated at Washington, D. C., this day of July 1954.

Certificate of Council

124 In United States Court of Appeals

[Title omitted]

ORDER DENYING REHEARING—August 13, 1954

IT IS ORDERED that the petition for rehearing and modification of decree in the above entitled and numbered cause be, and it is hereby DENIED.

125 Clerk's Certificate to foregoing transcript omitted in printing.

126-127 SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

—November 4, 1954

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 10, 1955.

Associate Justice of the Supreme
Court of the United States.

Dated this 4th day of November, 1954.

128 SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed March 7, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office - Supreme Court, U. S.
FILED
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HAROLD B. WILLEY, Clerk

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No. 527

In the Supreme Court of the United States

OCTOBER TERM, 1954

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE WARREN COMPANY, INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SIMON E. SOBELOFF,
Solicitor General,
Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE WARREN COMPANY, INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 30, 1954, dismissing the Board's petition that The Warren Company, Incorporated, be adjudged in contempt for violating a decree entered by that court enforcing, *inter alia*, a bargaining order issued by the Board against the Company.

OPINIONS BELOW

The opinion of the court below in the instant contempt proceedings (Appendix B, *infra*, pp. 3A-12A) is reported at 214 F. 2d 481. The opinion of the court below, pursuant to which the

original decree (R. 106–108) was entered, is reported at 197 F. 2d 814 (see *infra*, pp. 14A–15A).

JURISDICTION

The judgment of the court below (Appendix B, *infra*, p. 13A) was entered on June 30, 1954. The Board's petition for rehearing (R. 220–224) was denied on August 13, 1954 (R. 225). The time for filing a petition for certiorari was extended, by order of Mr. Justice Black dated November 4, 1954, to January 10, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

In issuing a decree enforcing an order of the National Labor Relations Board to bargain collectively with the Union, the court below, on settled authority, rejected the Company's defense that the Union's loss of majority status following the Company's unlawful refusal to bargain constituted a bar to enforcement. On petition to adjudicate the Company in civil contempt for refusing to comply with the decree, the Company reiterated the defense of the Union's loss of majority. The question is whether the court below properly dismissed the contempt petition on the ground that the "different considerations" applicable to contempt proceedings validate the defense which admittedly was not a bar to a decree of enforcement.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151, *et seq.*), are set forth in Appendix A, *infra*, pp. 1A–2A.

STATEMENT

The relevant facts giving rise to the instant contempt proceeding are, as shown by the record and the pleadings, virtually undisputed.

A. Events prior to the contempt proceeding

On November 20, 1948, and thereafter, the respondent Company, asserting a doubt as to the majority status of the Union (District Lodge No. 46, International Association of Machinists), declined to recognize the Union which had been designated by the majority of the employees in an appropriate unit as their collective bargaining representative. Promptly after the Union's request for recognition, the Company discharged several Union adherents. Unfair labor practice charges were filed against the Company and, pursuant to complaint and hearing thereon, the National Labor Relations Board, on June 30, 1950, issued a Decision and Order in which it found that the Company's discharge of the Union adherents was discriminatory within the meaning of the National Labor Relations Act, and that its refusal to recognize and bargain with the Union, not being motivated by a good faith doubt of the Union's majority status, was also violative of the

Act. Accordingly, the Board directed the Company to cease and desist from its unfair labor practices, to reinstate the discharged employees with back pay, to bargain collectively with the Union upon request, and to post notices stating that it would do so. *Matter of the Warren Company*, 90 NLRB 689.

Following the issuance of the Board's Decision and Order, the Company reinstated the discharged Union members with back pay and posted notices (R. 104). However, despite repeated requests by the Union for bargaining conferences, the Company met with the Union on only one occasion, September 8, 1950 (R. 113, 124–125). On that occasion the Union submitted a proposed contract, explaining its provisions. The Company took no position at this meeting with respect to the proposed contract but undertook to study the proposal and to make its position known later (R. 113–114). Further repeated Union requests for bargaining negotiations or for a statement of the Company's position with respect to the proposed contract were unavailing (R. 114). Moreover, on August 6, 1951, just before the Board filed its petition for enforcement in the court below, the Company wrote the Union that, of the employees originally comprising the unit found appropriate by the Board, and a majority of whom had designated the Union as the bargaining representative, only two remained

in the Company's employ and that the Company doubted the Union's majority status (R. 157–158).[1]

On the Board's petition in the court below for enforcement of its order, the Company urged that, notwithstanding the sufficiency of the evidence to support the Board's findings and order, enforcement should be denied "because the order has been obeyed in all of its provisions and, because of changed conditions not attributable to Respondent's conduct, the Union does not now represent a majority in this small unit and Respondent should not be required to bargain further with it" (R. 104; 197 F. 2d 814). The court below rejected these contentions on the authority of this Court's decision in *National Labor Relations Board* v. *Mexia Textile Mills*, 339 U. S. 563 (R. 103–105; 197 F. 2d 814, *infra*, pp. 14A–15A).

[1] The Company's August 6 letter stated that the original complement consisted of nine employees, one of whom was found by the Board to be a supervisor (90 NLRB, at 709). Of the remaining eight, seven had authorized the Union to represent them for purposes of collective bargaining (*ibid.*). As already noted, several of the latter had been discharged but were reinstated shortly after the Board's order of June 30, 1950. By August 6, 1951, however, these and other employees were apparently no longer in the Company's employ and the unit, according to the August 6 letter, consisted of eight employees, containing only two of the original group, both of whom had signed Union authorization cards (90 NLRB, at 709).

and, on August 7, 1952, entered its decree enforcing the Board's order (R. 106–110).[2]

On August 26, 1952, nineteen days after the entry of the decree, the Company notified the Board and the Union that, as stated in its Response to the Board's petition for Enforcement, the Company had already complied with all affirmative provisions of the Board order, including notice-posting, reinstatement of discharged employees with back pay, and bargaining,[3] and that the Union no longer represented a majority of the employees since only two of the employees in the original unit remained in the Company's employ (R. 161–162). The Company also stated that "while the Union's alleged loss of majority may not be urged as a defense in an enforcement proceeding, it can be urged as a defense in further proceedings" (R. 161).

Consistently with this position, the Company for the next several months failed to comply with

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[2] The court below noted that the *Mexia* decision settled the doctrine that an alleged loss of majority may not be urged as a defense in an enforcement proceeding, and that the same decision expressly ruled that compliance with a Board order does not affect the right to enforcement, pointing out that the framers of the Act contemplated "that there be 'immediately available to the Board an existing court decree to serve as a basis for contempt proceedings' in the event a renewal of the unfair practice occurs after the enforcement order" (197 F. 2d 814, *infra*, p. 15A).

[3] Admittedly, the only "bargaining" which had taken place theretofore was the meeting of September 8, 1950, prior to the entry of the enforcement decree, at which the Union submitted a proposed contract and the Company took no position (*supra*, p. 4).

repeated Union requests for a bargaining conference and/or for the submission of relevant data concerning wages and working conditions (R. 114–118). Throughout its extended correspondence with the Union, the Company, while professing its willingness to meet with the Union, persisted in the position that it had already bargained with the Union and that the Union no longer represented the employees (R. 164–172). On January 19, 1953, the Company and the Union met for the second and last time. The Company took the position, confirmed in its letter of the following day, that the Company "was in doubt as to the majority status of the Union, and for that reason, hesitated to bargain with the Union on the matter of a contract" (R. 172). The Company asked the Union to consent to a decertification election to be conducted by the Board, and upon the Union's refusal to consent, itself filed with the Board a petition for a decertification election (R. 117, 172, 174, 192). Attached to the petition was a communication to the Company from five of the employees stating that the Union did not represent them and requesting that it be decertified (R. 192–192).[4] On March 4, 1953, the

[4] This communication was dated November 3, 1953, approximately three months after the court below entered its decree enforcing the Board's bargaining order. It is noteworthy also that two of the employees concerned, Smelley and Reives, were initial adherents of the Union in November 1948 when the Union initiated its prolonged and unsuccessful effort to obtain recognition and bargaining rights.

Board affirmed its Regional Director's dismissal of the petition on the ground that the Company had not yet complied with the bargaining requirements of the Board order and court decree (R. 118, 193–195). A further Union request for bargaining failed to elicit even a reply from the Company (R. 132).

Accordingly, the Board in September 1953 initiated contempt proceedings in the court below to compel compliance by the Company with the bargaining requirements of the decree (R. 111–177).[5]

B. The contempt proceeding

The Board's petition that the Company be adjudicated in contempt set forth in substance the facts recited above (R. 111–177). The Company filed its Answer to the Board's Petition (R. 180–201), admitting the factual allegations of the Board's petition, but denying its conclusions. Specifically, the Company's Answer alleged that it had complied with the Board order and court decree except as to the bargaining requirement (R. 184, 196). In that respect, the Answer repeatedly and unequivocally admitted its refusal

[5] In its petition to the court below, the Board sought relief both in civil and criminal contempt and included an allegation that, in addition to the Company's noncompliance with the bargaining requirement, the Company had also failed to comply in good faith with the notice-posting provision of the order and decree. The review now being sought, however, pertains only to the failure of the court below to grant relief in civil contempt with respect to the bargaining order.

to bargain with the Union (R. 184, 185, 186–187, 196).[6] However, the Answer reiterated the position the Company had taken in the court below on the petition for enforcement; *i. e.*, that the Union did not and never had represented a majority of the employees (*ibid.*). The Answer alleged further that five out of the six employees presently employed by the Company had specifically repudiated the Union; that the Union had ignored the Company's repeated requests to demonstrate its majority anew; and that the Board had dismissed the Company's petition for a decertification election (R. 191–195). The Answer further averred that, under these circumstances, the Company's refusal to bargain with the Union after the entry of the decree was not an unlawful act, hence the Board's petition for adjudication in contempt should be dismissed.

On June 30, 1954, the court below entered its opinion denying the Board's petition (Appendix B, *infra*, pp. 3A–12A). Finding on the basis of the pleadings that the Union had lost its majority

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[6] The only qualification, if any, to this statement is the reference on page 11 of the printed Answer (R. 180) where the Company quotes from its Response to the Board's petition for enforcement in the prior proceeding to the effect that it "complied with every portion of the Board's decree except that it did not bargain to a conclusion with the Union. It did meet with the Union and discussed the possibility of a contract. At all times Respondent was in doubt that the Union represented a majority * * *." The meeting referred to is obviously the meeting of September 8, already described (*supra*, p. 4).

even prior to the decree of enforcement, the court below ruled that the Company's admitted refusal to bargain on that ground was warranted notwithstanding that the court had rejected the identical defense in the enforcement proceeding (*infra*, pp. 7A–12A). The court agreed that on settled authority the defense of loss of majority following an unlawful refusal to bargain could not be urged as a defense to an enforcement proceeding, but it went on to hold (*infra*, p. 11A) that the considerations underlying that rule have no application in a contempt proceeding. The court declared that "In such a proceeding the court determines for itself what order will best serve the public interest and at the same time vindicate its own decree, and it will not, in disregard of the plain language of the Act, that employees are entitled to choose their own bargaining representative and may not have one of their own choosing forced upon them, issue a contempt order which has the effect of doing so" (*ibid*).[7]

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[7] In the course of its opinion, the court below observed that the Company had "made an offer to bargain with the union" (*infra*, p. 9A); and that the Company had "complied * * * by agreeing to bargain with the union" (*infra*, pp. 11A–12A). These comments, as the Board noted in its petition for rehearing, are patently inconsistent with the Company's express admission that it had refused to bargain with the Union and with the undisputed facts recited above. Similarly, the statements of the court below that the Union's loss of majority was not the result of "unfair labor practices" and was "without fault" on the Company's part (*infra*, pp. 7A, 8A) overlook the uncontroverted fact that the Company

REASONS FOR GRANTING THE WRIT

It is settled law that where a union's majority status is dissipated, after an employer's unlawful refusal to bargain, the Board may appropriately find that such conduct has undermined the union's representative status and require the employer to bargain with it for a reasonable period, despite the loss of majority. *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U. S. 702. It is also established that the claim of an intervening loss of majority, following the employer's unlawful refusal to bargain, is no defense to a judicial proceeding for enforcement of an order requiring the employer to bargain with the union. *National Labor Relations Board* v. *Mexia Textile Co., Inc.*, 339 U. S. 563. And this Court has recently held that the Board may also properly require an employer to bargain with a certified union for one year despite an intervening loss of majority not attributable to any unfair labor practices by the employer, and that such order is

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from the beginning never remedied its unlawful refusal to bargain. The court's further statement (*infra*, p. 7A) that, in the Board's view, the order as enforced "required the respondent to bargain indefinitely" with the Union is likewise erroneous. The Board's position was, as stated in its petition for rehearing that "established legal precedents require respondent to remedy its unfair labor practice (the prior refusal to bargain with the union) by good faith bargaining with the union for a 'reasonable' period before it may challenge the union's majority status and refuse to bargain with the union on the ground that it no longer represents the employees."

entitled to judicial enforcement. *Brooks* v. *National Labor Relations Board*, No. 21, this Term, decided December 6, 1954.

In the enforcement proceeding out of which the present contempt action arises, the court below recognized that a union's alleged loss of majority following an employer's wrongful refusal to bargain cannot be urged as a defense to a decree enforcing a bargaining order and accordingly enforced the Board's order directing respondent to bargain (197 F. 2d 814, 815, *infra*, pp. 14A–15A). But in the contempt proceeding instituted to compel compliance with its decree, the court accepted the same defense which it had rejected in the enforcement proceedings and dismissed the proceedings on the ground that different "considerations" were applicable in contempt proceedings. The effect of the latter holding was, of course, to render the initial decree a nullity, since the remedy afforded by the decree is worth little more than its sanction, contempt.[8] If the Fifth Circuit were correct in its view that at the contempt stage it may accept the very same defense which it is required to reject in the enforcement proceedings,

[8] "It is no more than a commonplace to note that the value of a right, to a litigant, is no greater than the available remedy, and the remedy in equity is the injunction. This insight, however, should be worked to capacity, and we have not done so until we realize that the remedy, the injunction, is worth no more than its sanction, contempt." Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 Col. L. Rev. 780 (1943).

the result would be to nullify enforcement decrees in all loss-of-majority situations like those of either *Franks Bros.* or of *Brooks*. We submit that the ruling of the court below on the latitude of its contempt powers is inconsistent with the uniform holdings of this Court, as well as in square conflict with decisions of other courts of appeals, and that the question presented is of critical importance in the administration of the National Labor Relations Act.

1. The view of the court below that, in a contempt proceeding for violation of its decree, the controlling criterion is the discretion of the court as to "what order will best serve the public interest and at the same time vindicate its own decree" (*infra*, p. 11A), and that it may disregard well-settled principles of substantive law otherwise applicable has repeatedly been rejected by this Court. The basic doctrine was laid down in *Union Tool Co.* v. *Wilson*, 259 U. S. 107, where this Court said (at p. 112):

> In the determination of the question whether ~~where~~ an injunction has been violated and, if so, whether compensation shall be made to the injured party, there may be occasion for the exercise of judicial discretion; but the order to be entered in such a proceeding is not exclusively or necessarily a discretionary one. [Citing cases.] Moreover, legal discretion in such a case does not extend to a refusal to apply well-settled principles of law to a conceded state of facts.

The doctrine thus enunciated was recently applied in a contempt proceeding instituted by a federal administrative agency, *Penfield Co.* v. *Securities and Exchange Commission,* 330 U. S. 585. In that case, the defendant was found guilty by a district court in civil contempt for failure to comply with a court order enforcing a subpena *duces tecum* issued by the Commission in aid of an authorized investigation. The district court imposed an unconditional fine but refused to grant remedial relief designed to compel production of the subpenaed documents. On appeal to the Ninth Circuit, the court ruled that the imposition of the unconditional fine was error and directed that the defendant be imprisoned until he produced the documents (157 F. 2d 65). Affirming the decision of the court of appeals, this Court stated (330 U. S. at 590–592):

> The Act gives the Commission authority to require the production of books and records in the course of its investigations. And in absence of a basis for saying that its demand exceeds lawful limits [citation omitted], it is entitled to the aid of the court in obtaining them. A refusal of the court to enforce its prior order for the production of the documents denies the Commission that statutory relief. * * *
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> * * * * *
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> * * * the refusal of the District Court to grant the full remedial relief which the Act places behind the orders of the Commission was an abuse of discretion.

In the recent case of *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, a contempt proceeding instituted by the Wage and Hour Administrator for violation of a prior decree, this Court, reversing the court below, reemphasized the sharp limitation on a court's discretion to grant or withhold remedial relief. The Court noted that (at p. 191):

> The force and vitality of judicial decrees derive from more robust sanctions. And the grant or withholding of remedial relief is not wholly discretionary with the judge * * * [citing *Union Tool; supra*]. The private or public rights that the decree sought to protect are an important measure of the remedy.

Where, as here, the only justification proffered for the admitted refusal to comply with the bargaining provision of the prior decree was an alleged loss of majority which followed upon a wrongful refusal to bargain, a defense which on "well-settled principles" (*Union Tool, supra*) was not a bar to a decree of enforcement, withholding of appropriate remedial relief was clearly an abuse of discretion. Accord: *Parker* v. *United States*, 153 F. 2d 66, 70 (C. A. 1); *Sauber* v. *Whetstone*, 199 F. 2d 520, 523 (C. A. 7).

2. Squarely in conflict with the decision below is the ruling of the Court of Appeals for the Fourth Circuit in *Great Southern Trucking Co.* v. *National Labor Relations Board*, 139 F. 2d 984, cer-

tiorari denied, 322 U. S. 729.[9] In that case, which arose out of an unfair labor practice strike following a wrongful refusal to bargain (127 F. 2d 180, 184), the employer contended in the contempt proceeding that it was relieved of its obligation to bargain under the decree because the union had lost majority status since the entry of the decree; it alleged that none of the strikers who had accepted reinstatement which had been offered pursuant to the decree were still in the company's employ and a majority of the replacement employees had signed a petition stating that they did not desire to be represented by the union (139 F. 2d, at 985). There also, as here, the Board denied a company request to redetermine the union's majority status (*ibid.*). The Fourth Circuit rejected the contention and held the employer in

[9] See also *West Texas Utilities Co.* v. *National Labor Relations Board*, 206 F. 2d 442, 449, certiorari denied, 346 U. S. 885, where the Court of Appeals for the District of Columbia Circuit rejected a contention made by way of "defense and counterclaim" that because of the receipt of petitions from employees showing, allegedly, that the union no longer represented a majority of the employees; the employer should not be held in civil contempt for disregarding the court's order to bargain. Like defenses were also recently rejected by the Court of Appeals for the Tenth Circuit in two unreported contempt cases, *National Labor Relation Board* v. *Conover Motor Co.* and *National Labor Relations Board* v. *Phelps Brothers Service Co.*, both orders entered April 23, 1953, and by the Court of Appeals for the Second Circuit in an unreported contempt case, *National Labor Relations Board* v. *Todd Co., Inc.*, order entered June 27, 1950, certiorari denied, 340 U. S. 864.

contempt. Citing (among other decisions) the First Circuit's opinion in *National Labor Relations Board* v. *Franks Bros. Co.*, 137 F. 2d 989, subsequently affirmed by this Court, 321 U. S. 702, the court noted that the company's unlawful and protracted refusal to bargain with the union "necessarily must have had a telling impact" both with respect to maintaining the Union adherence of old employees[10] and with respect to obtaining new adherents from the incoming employees. Accordingly, the court held that "Inasmuch as the Company's own unlawful conduct created an atmosphere which made normal union growth and allegiance difficult, it will not now be permitted to urge its labor turnover and ensuing loss of union majority status as the basis for avoiding compliance with the remedial bargaining provision of our decree" (139 F. 2d, at 986). Accord: *Franks Bros.*, 321 U. S., at 705. Addressing itself to the contention, given decisive weight by the court below, that an adjudication of contempt would have the effect of imposing upon employees a representative that they had specifically repudiated, the court noted that under all the circumstances such a disavowal of the union could not be regarded as

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[10] As already noted, in the instant case the two original adherents of the Union (Smelley and Reives) who remained in the Company's employ finally repudiated the Union in November 1952, four years after its initial demand for recognition and bargaining, two years after the Board's order, and three months after the court decree (*supra*, p. 7).

"a true expression of their unhampered will. On the contrary, it rather indicates that at long last, after five years, the Company has been able successfully to thwart the employees' attempt to bargain collectively through representatives of their own untrammeled choice" (*ibid.*). Finally, the court noted that its disposition of the case did not grant to the Union a permanent status as exclusive bargaining representative for any fixed period of time (at p. 987):

> *After the conditions of free choice have been restored by collective bargaining, in good faith on the part of the Company,* then should these employees desire to be represented by some body other than the Union, they may then avail themselves of the statutory procedure of the Act itself * * * in order to guarantee that their genuine desires can be ascertained and respected. But until the Company purges itself of its unlawful conduct in violating our decree, the employees' true desires "are matters of speculation and argument." [Emphasis in original.]

Accord: *Franks Bros.*, 321 U. S., at 705–706, citing the *Southern Trucking* case.

3. The question presented here is of manifest importance in the administration of the Act and in administrative law generally. In the final analysis, the National Labor Relations Act, like comparable regulatory statutes, depends for its effective enforcement upon the exercise by the

courts of appeals of their contempt powers. A Board order is not enforced until it is actually obeyed (*Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 269–270), and Congress clearly relied upon the remedy of contempt as the ultimate sanction to secure obedience (*National Labor Relations Board* v. *Mexia Textile Mills*, 339 U. S. 563, 569).

The reservation by the court below of complete and independent discretion in withholding sanctions to compel compliance with its prior decree enforcing the Board's order, in the face of its acknowledgment that the applicable settled law required the entry of that decree, subverts the decree and destroys the whole unfair-labor-practice structure, devised by Congress and implemented by the Board and the courts, at its crucial contempt stage.[11]

This is not to say that the standards for enforcement of Board orders and for finding civil contempt may not vary in other respects.[12] They may not vary, however, with respect to an employer's obligation to remedy his prior wrongful

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[11] See also the disposition by the court below of recent cases not dissimilar from the instant proceeding, *National Labor Relations Board* v. *Aldora Mills*, 197 F. 2d 265, commented upon in 54 Col. L. Rev. 613; *National Labor Relations Board* v. *Red Arrow Freight Lines, Inc.*, 213 F. 2d 260.

[12] Thus, compliance with a Board order, while not a bar to enforcement, would be a complete defense to a civil contempt action. See the *Mexia* case, *supra*.

refusal to bargain where the sole defense is no more than a continuation of that wrongful conduct and a renewed attempt to reap the benefits of that refusal because of the defection of union adherents which may well have been caused by such wrongful action. To tolerate such a procedure would truly be "to foster experimentation with disobedience" (*Maggio* v. *Zeitz*, 333 U. S. 56, 69).

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

JANUARY 1955.

APPENDICES

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are as follows:

UNFAIR LABOR PRACTICES

SEC. 8 (a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings

and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

APPENDIX B

In the United States Court of Appeals for the Fifth Circuit

No. 13772

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE WARREN COMPANY, INCORPORATED, RESPONDENT

Petition for adjudication in civil contempt and for other civil relief; and request for institution of adjudication in, and punishment for criminal contempt

(June 30, 1954)

Before HUTCHESON, Chief Judge, HOLMES, Circuit Judge, and WRIGHT, District Judge

HUTCHESON, *Chief Judge:* Filed by the board to have respondent adjudged in civil contempt of our decree in cause No. 13772 on the docket of this Court, and also to suggest that it be proceeded against as for criminal contempt, the petition for the adjudication in civil contempt alleged that respondent has failed and refused, and con-

times to fail and refuse, to comply with paragraphs 1 (b) and 2 (d) of the decree.[1]

In reply, respondent, setting out the whole of our decree with its various prohibitions and injunctions, alleged that even before its entry it had complied, and is now in compliance with, each and every one of its provisions, including offering to reinstate, and reinstating, the five named employees and paying them the amounts determined to be due them, except that since the decree of this Court it has refused, and is refusing, to bargain collectively with the union as bargaining agent of its employees for the reasons set out in its answer as follows. The union does not represent, and has not for a long time represented its employees as bargaining agent. As early as Nov. 3, 1952, long after respondent had

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[1] Requiring respondent to:

"1. Cease and desist from:

* * * * * * *

"(b) Refusing to bargain collectively with District Lodge No. 46, International Association of Machinists, as the exclusive bargaining representative of all its tool and die makers, machinists, die setters, helpers, and apprentices, excluding clerical employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act;

"2. Take the following affirmative action which the Board has found will effectuate the policies of the National Labor Relations Act:

* * * * * * *

"(d) Upon request, bargain collectively with District Lodge No. 46, International Association of Machinists, as the exclusive representative of the above-mentioned employees and, if an understanding is reached, embody such understanding in a signed agreement;"

reinstated and reimbursed its employees, respondent received a communication[2] from five of the six employees in the unit affected, stating that the union did not represent them and requesting that it be decertified, and respondent, finding itself unable to prevail upon the union to furnish it countervailing evidence or to consent to an election, on January 27th, filed a petition with the regional board for an election, attaching to it the said request of its employees.

Thereafter and within ten days, it petitioned the board for a review, citing our case of *N. L. R. B.* v. *Aldora Mills*, 197 F. (2d) 265, and stating in part: "The law does not contemplate that an employer bargain with a representative who is not the true and lawful representative of the employees."

On March 4, 1953, the board, in a letter[3] to respondent's counsel, denied the appeal.

---

[2] "November 3, 1952:

"We the undersigned employees of the Warren Co. do not want the International Association of Machinists or any other union to represent us in the matter of collective bargaining with our employer. We request that the union be decertified as the bargaining agent.

Percy A. Wright,
E. L. Reives,
J. R. Mitchell,
P. J. Water,
C. A. Smelley."

[3] The letter is as follows:

"The Board has considered your request for review of the Regional Director's refusal to issue Notice of Hearings in the above case and has decided that the Regional Director's dismissal was proper on the ground that pursuant to a Decree of the United States Court of Appeals entered on August 7, 1952, enforcing the Board's Order in Case No. 40-CA-622, the

On the basis of this showing, respondent asserts: that following this court's decree, it has exhausted every recourse for a fair determination by the board of the majority status of the union; that it has been denied these orderly processes; and that it does not believe that this court would wish or require it to bargain with the union which does not represent, and has not for a long time represented, the employees as bargaining agent. For this reason and for this reason alone, and not because it is contemptuous of this court's decree, it has failed to bargain collectively with the union.

The board, in its reply to respondent's answer, does not deny or otherwise put in issue the allegations of fact in it. It merely avers that these facts are not material. As the board sees it, the only material facts are these: the board determined that the respondent was guilty of unfair labor practices and ordered that it bargain with the union as representative and bargaining agent for the unit; the court granted the board's petition for enforcement of that order and ordered it enforced; and the respondent admitted that, though board and court have so ordered, it refuses to do so. On the basis of these admitted facts, the board insists that respondent stands without defense and, as matter of law, must be adjudged in civil contempt and required to bargain, and that the court should also proceed in criminal

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Employer is obligated to bargain with Lodge No. 46, International Association of Machinists, AFL, for the employees described in the instant petition and if an understanding is reached, to embody such understanding in a written agreement."

contempt and punish respondent by fine or imprisonment or both.

We cannot at all agree with these views. On the contrary, we think the facts alleged by respondent and in effect admitted by petitioner make it clear that the charge of criminal contempt, that is of wilful and deliberate defiance of our decree, is wholly without legal or factual basis, and that, on the issue of civil contempt, the facts make strongly for, if they do not in fact and in law compel, a negative answer to the question this proceeding presents, and thus make out a complete defense to the charge.

This question is, must respondent be adjudged in civil contempt of our order because, under the facts of this case detailed in its answer, it refuses to bargain with a union which does not now represent, and has not for a long time represented, its employees and which they have requested respondent in writing not to recognize as bargaining agent for them.

The board's position on the question shortly stated is that since the board directed the respondent to bargain with the union as the representative of the unit in question, and we directed the enforcement of the board's order, its and our order fixed the status of the union as bargaining representative of the unit and required the respondent to bargain indefinitely with it, even though, without fault on respondent's part, the membership of the unit has changed its composition so that its members are no longer members of the union, and, in addition, five out of six of the employees constituting the unit have filed a written request to respondent not to bargain with it as their

representative. This position is apparently based in part upon the board's idea that after it has made a determination as to the bargaining agent of the employees, it is not for the employees but for it to determine who shall continue to represent them and in part upon decisions of the court that in enforcement proceedings it is not a defense that the union has lost its majority if this loss is due to the wrongful actions of the respondent.

Respondent, while conceding the rule to be as stated by the board, where the proceeding is one for enforcement of the board's order and the evidence shows that the loss of representation is due to unfair labor practices of the employer, insists that the rule does not, it cannot apply here, because (1) it is affirmatively shown that the loss of the union's position as bargaining agent is not the result of unfair labor practices but of a turnover of the employees or a change of opinion on their part, not brought about or contributed to by the employer, and (2) because this is not an enforcement but a contempt proceeding.

As it applies its argument to the undisputed facts here presented, the respondent states it thus: Granted that because of the findings of the board which were affirmed by this court, appellant had no right to defend against the enforcement proceeding on the ground that, though the contrary was found by the board, the union did not in fact represent its employees, an entirely different question is presented in this contempt proceeding. This results from the admitted facts that after the entry of the board's order and long before the entry of our decree, the respondent posted the required notices, reinstated the five discharged em-

ployees with back pay and made an offer to bargain with the union, and later, and without fault on respondent's part, the employees in the unit repudiated, and are still repudiating the union as bargaining agent.

It points to the undisputed facts of record: that before and after the entry of the decree, without fault on the part of respondent but due solely to the natural turnover among its employees, the union lost its majority and ceased to represent the unit; that based upon the written request in November of 1952, of five of the six employees then constituting the unit, the respondent in January of 1953, filed with the regional office of the board a petition requesting it to determine by an election whether the union represented a majority of the unit, and the regional director first, and the board later, denied the petition for an election.

So pointing, it insists that it is the board, and not the respondent, which is preventing the employees from choosing their own representative and forcing upon them a representative not of their own choosing, and the respondent is, therefore, not in contempt of our decree whose sole purpose was, and whose effect ought to be, to protect the employees' right of choosing their own representative and of not having one they did not choose and do not want thrust upon them. So insisting, respondent, on the basis of the many cases which it cites,* including our own case of

* *Frank Bros. Co.* v. *N. L. R. B.*, 321 U. S. 702, in which the court held that "The Board's order does not fix a permanent bargaining relationship without regard to new situations which may develop"; *N. L. R. B.* v. *Aldora Mills*, 197 F. (2)

Aldora Mills, *supra*, urges upon us, that in a contempt proceeding, unlike in an enforcement proceeding, the question of the reality of the claimed representation can and will be inquired into and when, as here, it appears that the enforcement of the court's decree in accordance with its terms would work a present injustice to and injury upon the employees by forcing them to accept a bargaining agent which they did not choose and do not want, the court will not, under the guise of holding respondent in contempt, force upon the employees a bargaining agent they do not want. Particularly will it not do so where it appears, as here, that the board, by refusing to consider or otherwise lend its assistance to the decertification petition, and not the respondent, is responsible for the situation which now exists.

The board meets this argument with the countercontention that it stands, as to the decree entered in its favor, in the same case and entitled to the same extent to enforce it as written, as a private litigant who has obtained an injunctive order in its favor, and that since in such a situation the court would not reconsider the equities as between the parties to the decree, and upon that reconsideration refuse to hold the contemnor in contempt, neither will the court do so here.

256, and cases cited in it; *Mid-Continent Pet. Corp.* v. *N. L. R. B.*, 204 F. (2) 613; *N. L. R. B.* v. *Inter City Adv. Co.*, 154 F. (2) 244; *N. L. R. B.* v. *Appalachian Elec. Power Co.*, 140 F. (2) 217; *N. L. R. B.* v. *Century Oxford Mfg. Corp.*, 140 F. (2) 541; *N. L. R. B.* v. *Mayer*, 196 F. (2) 286; *N. L. R. B.* v. *Bradley Washfountain Co.*, 192 F. (2) 144. Cf. *N. L. R. B.* v. *Red Arrow* (5th Cir. 5-14-54).

We cannot agree with the board that the matter so stands here. Under the settled law that the remedies provided by the act are public, nor private, remedies, that orders and decrees are entered not in vindication of private, but of public, rights, it is, we think, plain that the board is not entitled to a contempt order enforcing the court's decree, if, in the court's opinion, such a contempt adjudication will result in a violation of the act and of the public policy for which it stands. The considerations which underlie the holdings of the court on which the board relies, that whether enforcement of the board's order should be granted or denied is to be determined not upon new evidence but upon the record on which the board's order is based, and, therefore, a respondent may not show as a defense in an enforcement proceeding that the union has lost its majority, have no application in a contempt proceeding to which entirely different considerations apply. In such a proceeding the court determines for itself what order will best serve the public interest and at the same time vindicate its own decree, and it will not, in disregard of the plain language of the act, that employees are entitled to choose their own bargaining representative and may not have one not of their own choosing forced upon them, issue a contempt order which has the effect of doing so.

In this case it appears without dispute that after the entry of the board's order and before the entry of the enforcement decree in this case, the respondent complied fully with all the provisions of the order by reinstating and paying back wages to discharged employees, by posting notices and

by agreeing to bargain with the union as their representative. It further appears that, after the entry of our decree, the respondent, advised by his then employees, that they were not members of the union and that they did not wish to have the union represent them and wished it decertified, requested the board to take the proper steps to inquire into and determine the truth of the matter and the board having refused to do so, the respondent in good faith determined that it would be unlawful, unwise, and unfair for it to bargain with the union, and that it would not be contemptuous of it to refuse to bargain with it as representative of its members. Under these circumstances, we think that the court, instead of vindicating, would stultify, itself and its decree and do violence to the act if it ordered the employer to force upon its employees as bargaining agent a union not of their own choosing merely because some six years before the board had ordered the employer to recognize it as bargaining agent for its then employees.

We think that no case for a contempt order is made out. The petition is denied and the contempt proceeding is dismissed.

13-A

JUDGMENT

Extract from the Minutes of June 30, 1954

No. 13772

NATIONAL LABOR RELATIONS BOARD

v.

THE WARREN COMPANY, INCORPORATED

This cause came on to be heard on the Petition of the National Labor Relations Board for Adjudication in Civil Contempt and for other Civil Relief; and Request for Institution of Adjudication in, and Punishment for Criminal Contempt, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that said petition be, and the same is hereby, denied and the contempt proceeding is dismissed.

In the United States Court of Appeals for the Fifth Circuit

No. 13772

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE WARREN COMPANY, INCORPORATED,

RESPONDENT

Petition for the Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D. C.

(June 24, 1952)

Before HOLMES, RUSSELL, and RIVES, Circuit Judges

RIVES, *Circuit Judge:* This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10 (e) of the National Labor Relations Act as amended,[1] for enforcement of its order issued against respondent following proceedings under Section 10 of the Act. The Board's decision and order are reported at 90 N. L. R. B. 689.

With commendable candor respondent's counsel has stated its position as follows:

> We have controverted the findings of fact of the Board in our Response, but in all fairness to this Court we are constrained to admit that there is sufficient evidence, even though disputed, upon which to base the Board's order.

[1] 61 Stat. 136, 29 U. S. C. Supp. IV, Sec. 151 et seq.

> Our Contention, therefore, is that the Board's order should not be enforced by this Court, not because of the insufficiency of evidence, but because the order has been obeyed in all of its provisions and, because of the Union does not now represent a majority in this small unit and Respondent should not be required to bargain further with it. [Emphasis the respondent's.]

The Supreme Court has expressly ruled that compliance with an order of the Board does not affect the Board's right to enforcement, pointing out that the legislative history of the Act indicates that the framers of the Act contemplated "that there be 'immediately available to the Board an existing court decree to serve as a basis for contempt proceedings', in the event a renewal of the unfair practice occurs after the enforcement order." *N. L. R. B.* v. *Mexia Textile Mills*, 339 U. S. 563, 567, 569.[2]

The same decision (see page 568) settles the doctrine that the Union's alleged loss of majority may not be urged as a defense in an enforcement proceeding. See also *N. L. R. B.* v. *Sanson Hosiery Mills*, C. A. 5, No. 13726, decided April 10, 1952; cf. *N. L. R. B.* v. *Aldora Mills*, C. A. 5, No. 12900, decided June 6, 1952.

It results that the Board's petition is granted and its order

ENFORCED.

---

[2] See also *N. L. R. B.* v. *American National Insurance Company*, No. 126, October Term, 1951, decided May 26, 1952, see Footnote 4; *N. L. R. B.* v. *Pool*, 339 U. S. 577, 581; *N. L. R. B.* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217, 226; *N. L. R. B.* v. *Hills Bros. Co.*, 161 F. 2d 179, 180 (C. A. 5); *N. L. R. B.* v. *Davis*, 172 F. 2d 225 (C. A. 5).

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No. 27

In the Supreme Court of the United States

OCTOBER TERM, 1955

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE WARREN COMPANY, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

SIMON E. SOBELOFF,
Solicitor General,
Department of Justice,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 27

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE WARREN COMPANY, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below in the instant contempt proceeding (R. 77-83)[1] is reported at 214 F. 2d 481. The opinion of the court below (R. 1-3), pursuant to which the original decree (R. 3-7) was entered, is reported at 197 F. 2d 814.

JURISDICTION

The judgment of the court below dismissing the contempt proceeding (R. 83) was entered on June

[1] The symbol "R." refers to the pages of the printed record.

30, 1954. The petition for a writ of certiorari was filed on January 7, 1955, and granted on March 7, 1955 (R. 87). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

In issuing a decree enforcing an order of the National Labor Relations Board to bargain collectively with the Union, the court below rejected the Company's defense that the Union's loss of majority status following the Company's unlawful refusal to bargain constituted a bar to enforcement. Subsequently, on petition to adjudicate the Company in civil contempt for refusing to comply with the decree, the Company reiterated the defense of the Union's loss of majority. The question is whether the court below properly dismissed the contempt petition on the ground that the "different considerations" applicable to contempt proceedings validate the defense which admittedly was not a bar to a decree of enforcement.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 31-33.

STATEMENT

The relevant facts giving rise to the instant contempt proceeding are, as shown by the record and the pleadings, virtually undisputed.

A. *Events prior to the contempt proceeding*

On November 20, 1948, and thereafter, the respondent Company, asserting a doubt as to the majority status of the Union (District Lodge No. 46, International Association of Machinists), declined to recognize the Union which had been previously designated by the majority of the employees in an appropriate unit as their collective bargaining representative. Promptly after the Union's request for recognition, the Company discharged several Union adherents and soon thereafter replaced some of them with other employees. Upon learning of this situation, the Union withdrew from an agreement, previously entered into by the Company and the Union, to determine the bargaining representative of the employees by means of a Board-conducted election and filed unfair labor practice charges. Pursuant to complaint and hearing thereon, the Board, on June 30, 1950, issued a Decision and Order in which it found that the Company's discharge of the Union adherents was discriminatory within the meaning of the National Labor Relations Act, and that its refusal to recognize and bargain with the Union, not being motivated by a good faith doubt of the Union's majority status, was also violative of the Act. Accordingly, the Board directed the Company to cease and desist from its unfair labor practices, to reinstate the discharged employees with back pay, to bargain collectively with the Union upon request, and to post notices stating that it would do

so, *Matter of the Warren Company*, 90 NLRB 689.

Following the issuance of the Board's Decision and Order, the Company reinstated the discharged Union members with back pay and posted notices (R. 63-64). However, despite repeated requests by the Union for bargaining conferences, the Company met with the Union on only one occasion, September 8, 1950 (R. 9-10, 65). On that occasion the Union submitted a proposed contract, explaining its provisions. The Company took no position at this meeting with respect to the proposed contract but undertook to study the proposal and to make its position known later (R. 9, 65). Further Union requests for bargaining negotiations or for a statement of the Company's position with respect to the proposed contract were unavailing (R. 9-10, 65). Moreover, on August 6, 1951, just before the Board filed its petition for enforcement in the court below, the Company wrote the Union that of the employees originally comprising the unit found appropriate by the Board, a majority of whom had designated the Union as their bargaining representative, only two remained in the Company's employ and that the Company doubted the Union's majority status (R. 41).[2]

[2] The Company's August 6 letter stated that the original complement consisted of nine employees, one of whom was found by the Board to be a supervisor (90 NLRB, at 709). Of the remaining eight, seven had authorized the Union to represent them for purposes of collective bargaining (*ibid.*). As already noted, several of the latter had been discharged but were reinstated shortly after the Board's order of June

On the Board's petition in the court below for enforcement of its order, the Company urged that, notwithstanding the sufficiency of the evidence to support the Board's findings and order, enforcement should be denied "because the order has been obeyed in all of its provisions and, because of changed conditions not attributable to Respondent's conduct, the Union does not now represent a majority in this small unit and Respondent should not be required to bargain further with it" (R. 1-2, 197 F. 2d 814). The court below rejected these contentions on the authority of this Court's decision in *National Labor Relations Board* v. *Mexia Textile Mills*, 339 U.S. 563 (R. 2, 197 F. 2d 814), and on August 7, 1952, entered its decree enforcing the Board's order (R. 3-7).[3]

On August 26, 1952, nineteen days after the entry of the decree, the Company notified the Board and the Union that the Company had already com-

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30, 1950. By August 6, 1951, however, these and other employees were no longer in the Company's employ and the unit, according to the August 6 letter, consisted of eight employees, containing only two of the original group, both of whom had signed Union authorization cards (90 NLRB. at 709).

[3] The court below noted that the *Mexia* decision settled the doctrine that an alleged loss of majority may not be urged as a defense in an enforcement proceeding, and that the same decision expressly ruled that compliance with a Board order does not affect the right to enforcement, pointing out that the framers of the Act contemplated "that there be immediately available to the Board an existing court decree to serve as a basis for contempt proceedings in the event a renewal of the unfair labor practices occurs after the enforcement order (R. 2, 197 F. 2d 814).

plied with all affirmative provisions of the Board order including notice-posting, reinstatement of discharged employees with back pay, and bargaining;[4] and that the Union no longer represented a majority of the employees since only two of the original group remained in the Company's employ (R. 44-45). The Company also stated that "While the Union's alleged loss of majority may not be urged as a defense in an enforcement proceeding, it can be urged as a defense in further proceedings" (R. 44).

Consistently with this position, the Company for the next several months failed to comply with repeated Union requests for a bargaining conference and/or for the submission of relevant data concerning wages and working conditions (R. 10-12, 65). Throughout its extended correspondence with the Union, the Company, while professing its willingness to meet with the Union, persisted in the position that it had already bargained with the Union and that the Union no longer represented the employees (R. 44-53). On January 19, 1953, the Company and the Union met for the second and last time. The Company took the position, confirmed in its letter of the following day (R. 55), that the Company "was in doubt as to the majority status of the Union, and for that reason hesitated to bargain with the Union on the matter of a contract"

[4] Admittedly, the only bargaining which had taken place theretofore was the meeting of September 8, 1950, prior to the entry of the enforcement decree, at which the Union submitted a proposed contract and the Company took no position (*supra*, p. 4).

(R. 11, 65). The Company asked the Union to consent to a decertification election to be conducted by the Board, and upon the Union's refusal to consent, itself filed with the Board a petition for a decertification election (R. 11-12, 65, 55). Attached to the petition was a communication to the Company from five of its employees stating that they did not want the Union to represent them and requesting that it be decertified (R. 68-69).[5] On March 4, 1953, the Board affirmed its Regional Director's dismissal of the petition on the ground that the Company had not yet complied with the requirements of the Board order enforced by the court below (R. 12, 65, 70, 72-73). A further Union request for bargaining dated May 9, 1953, failed to elicit even a reply from the Company (R. 12, 65).

Accordingly, the Board in September 1953 initiated contempt proceedings in the court below to compel compliance by the Company with the bargaining requirements of the decree (R. 7-15).[6]

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[5] This communication was dated November 3, 1952, approximately three months after the court below entered its decree enforcing the Board's bargaining order. Two of the signatories to this communication, Rieves and Smelley, were initial adherents of the Union in November 1948 when the Union initiated its prolonged and unsuccessful effort to obtain recognition and bargaining rights (R. 41; 90 NLRB 689, 699).

[6] In its petition to the court below, the Board sought relief both in civil and criminal contempt and included an allegation that, in addition to the Company's noncompliance with the bargaining requirement, the Company had also failed to comply in good faith with the notice-posting provision of the order and decree. The review now being sought, however, pertains only to the failure of the court below to grant relief in civil contempt with respect to the bargaining order.

B. *The contempt proceeding*

The Board's petition that the Company be adjudicated in contempt set forth in substance the facts recited above (R. 7-60). The Company filed its Answer to the Board's Petition, admitting the factual averments of the Board's petition, but denying its conclusions (R. 60-73). Specifically, the Company's Answer alleged that it had complied with the Board order and court decree except as to the bargaining requirement (R. 62-64, 71). In that respect, the Answer repeatedly and unequivocally admitted the Company's refusal to bargain with the Union (R. 62, 63, 64, 71).[7] However, the Answer reiterated the position the Company had taken in the court below on the petition for enforcement, *i.e.*, that the Union did not and never had represented a majority of the employees *(ibid.)*. The Answer alleged further that five out of the six employees then employed by the Company had specifically repudiated the Union; that the Union had ignored the Company's repeated requests to dem-

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[7] The only qualification, if any, to this statement is set forth in paragraph VI of the Answer (R. 67). There the Company alluded to the allegations contained in its Response to the Board's petition for enforcement in the prior proceeding to the effect that,

> Respondent complied with every portion of the Board's decree except that it did not bargain to a conclusion with the Union. It did meet with the Union and discussed the possibility of a contract. At all times Respondent was in doubt that the Union represented a majority . . .

The meeting referred to is obviously the meeting of September 8, already described (*supra*, p. 4).

onstrate its majority anew; and that the Board had dismissed the Company's petition for a decertification election (R. 62-63, 68-72). The Answer averred that under these circumstances the Company's refusal to bargain with the Union after the entry of the decree was not an unlawful act, hence the Board's petition for adjudication in contempt should be dismissed (R. 71).

On June 30, 1954, the court below entered its opinion and judgment denying the Board's petition and dismissing the contempt proceeding (R. 77-83, 214 F. 2d 481). Finding on the basis of the pleadings that the Union had lost its majority even prior to the decree of enforcement, the court below ruled that the Company's admitted refusal to bargain on that ground was warranted notwithstanding that the court had rejected the identical defense in the enforcement proceeding (R. 80-83, 214 F. 2d, at 483-485). The court below agreed that on settled authority the defense of loss of majority following an unlawful refusal to bargain could not be urged as a defense to an enforcement proceeding, but it went on to hold (R. 82, 214 F. 2d, at 485) that the considerations underlying that rule "have no application in a contempt proceeding to which entirely different considerations apply." The court below declared that "In such a proceeding the court determines for itself what order will best serve the public interest and at the same time vindicate its own decree, and it will not, in disregard of the plain language of the act, that employees are entitled to choose their own bargaining representative and

may not have one not of their own choosing forced upon them, issue a contempt order which has the effect of doing so" *(ibid.)*.[8]

SUMMARY OF ARGUMENT

It is settled law that where a union's majority status is dissipated after an employer's unlawful refusal to bargain with it, the Board can appropriately find that such conduct has undermined the status of the union and can order the employer to bargain with it for a reasonable period despite the loss of majority. The union's intervening loss of majority status is no defense to a judicial proceeding for enforcement of such a Board order.

[8] In the course of its opinion the court below recited that the Company had "made an offer to bargain with the union" (R. 81-82, 214 F. 2d, at 484); and that the Company had "complied * * * by agreeing to bargain with the union" (R. 82, 214 F. 2d, at 485). These recitations, as the Board noted in its petition for rehearing (R. 84), are patently inconsistent with the Company's express admission that it had refused to bargain with the Union and with the undisputed facts set forth above. Similarly, the statements of the court below that the Union's loss of majority was not the result of "unfair labor practices" and was "without fault" on the Company's part (R. 80, 214 F. 2d, at 483) overlook the uncontroverted fact that the Company from the beginning never remedied its unlawful refusal to bargain. The court's further statement *(ibid.)* that, in the Board's view, the order as enforced "required the respondent to bargain indefinitely" with the Union is likewise erroneous. In its petition for rehearing (R. 85), the Board expressly declared that "established legal precedents require respondent to remedy its unfair labor practice (the prior refusal to bargain with the union) by good faith bargaining with the union for a 'reasonable' period before it may challenge the union's majority status and refuse to bargain with the union on the ground that it no longer represents the employees." See n. 16, *infra*, p. 29.

Franks Bros. Co. v. National Labor Relations Board, 321 U. S. 702; *National Labor Relations Board v. Mexia Textile Mills, Inc.*, 339 U. S. 563. A contrary result, as this Court has pointed out, would enable employers to "profit from a stubborn refusal to abide by the law." *Franks Bros., supra*, at p. 705.

The court below applied the foregoing principles when it issued its decree enforcing the Board's order requiring respondent to bargain with the union despite the claim of an intervening loss of the union's majority status. Nevertheless, when the Board instituted contempt proceedings against respondent for failure to comply with the decree, the court below dismissed the proceedings on the ground that "In such proceeding the court determines for itself what order will best serve the public interest and at the same time vindicate its own decree * * *." In so doing the court misconceived its role in the statutory scheme devised by Congress to govern labor relations and overstepped the permissible boundaries of its contempt discretion.

The enforcement procedures of the Act contemplate coordinated action between the Board and the courts of appeals for the attainment of the common end, namely, to prevent and remedy unfair labor practices. "And the proper working of the scheme fashioned by Congress * * * demands that the courts quite as much as the administrative body act as Congress has required." *(National Labor Relations Board v. Bradford Dyeing As-*

sociation, 310 U. S. 318, 342-343). The statute precludes any assumption that a court discharges its responsibility under the Act when it enters a decree enforcing a Board order and that any action thereafter with respect to compelling compliance with the decree is purely a matter within its unqualified discretion. The decree, like the order it enforces, is aimed at the prevention of unfair labor practices, and so long as compliance is not forthcoming the initial decree is a nullity and the Congressional objective is frustrated.

The view of the court below that while the entry of a decree enforcing the Board's bargaining order was required by controlling law, nevertheless it was a matter wholly within the court's discretion whether it would require obedience to the decree, represents an unwarranted departure from general principles of equity jurisprudence. This Court has repeatedly held that a court does not have such limitless discretion in the application of contempt sanctions to enforce compliance with an outstanding decree. Certainly "legal discretion in such a case does not extend to a refusal to apply well-settled principles of law to a conceded state of facts." *Union Tool Co.* v. *Wilson*, 259 U.S. 107, 112. Under settled law the Board was entitled to an effective judicial decree enforcing its order requiring respondent to bargain with the union, despite any intervening loss of majority status, and the court below so recognized. The court's refusal to enforce that decree nullified it and withheld the relief which the Act requires. The enforcement

power of the court is derived from the Act, and the standard governing judicial exercise of discretion is to be found in the provisions and policy of the Act.

ARGUMENT

The Court Below Erroneously Dismissed the Board's Petition to Adjudicate Respondent in Civil Contempt for Failure to Comply With Its Decree Enforcing the Board's Bargaining Order, Where the Sole Defense Offered Was the Union's Loss of Majority Following Respondent's Unlawful Refusal to Bargain, the Identical Defense Rejected by the Court Below as a Bar to Enforcement.

Since *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702, it is settled law that a union's loss of majority following an employer's unlawful refusal to bargain is no defense to a judicial proceeding for enforcement of a Board order requiring the employer to bargain with the union. *National Labor Relations Board* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563; cf. *Brooks* v. *National Labor Relations Board*, 348 U.S. 96. The court below expressly acknowledged this principle when it entered a decree enforcing the Board's bargaining order, notwithstanding respondent's claim of an intervening loss of majority. Nevertheless, when the Board instituted contempt proceedings upon respondent's failure to comply with the decree, the Court below ruled that the identical claim justified respondent's noncompliance.

The question presented is whether this defense, which is concededly inadequate to bar the entry

of an enforcing decree, is nonetheless adequate to afford immunity in a civil contempt proceeding for failure to comply with the terms of that decree. An affirmative answer to this question necessarily renders the initial decree a nullity since, for all practical purposes, the remedy afforded by the decree is worth little more than its sanction, contempt.[9] Hence the question presented may be phrased in other terms, namely, whether a court has discretion in a civil contempt proceeding to nullify its prior decree by withholding sanctions to compel compliance when the sole defense offered to justify noncompliance is on settled principles of law no bar to entry of the decree.

The court below predicated its dismissal of the contempt petition on two grounds. The first ground was that to compel respondent to bargain with a union which has lost its majority would defeat the statutory mandate that employees are entitled to choose their own bargaining representative and may not have one not of their own choosing forced upon them. This was the precise issue resolved in the prior enforcement proceeding, however; and, as we shall presently demonstrate, the very statement misconceives the statutory scheme and the controlling law here applicable.

[9] "It is no more than a commonplace to note that the value of a right, to a litigant, is no greater than the available remedy, and the remedy in equity is the injunction. This insight, however, should be worked to capacity, and we have not done so until we realize that the remedy, the injunction, is worth no more than its sanction, contempt." Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 Col. L. Rev. 780 (1943).

The second ground advanced by the court below was that the considerations applicable to an enforcement proceeding are entirely different from those applicable in a contempt proceeding, and that in the latter instance the court is free to determine for itself what order will best serve the public interest and at the same time vindicate its own decree. We submit that the court in this regard misconstrued the nature of its enforcement powers under the Act, and that its refusal in the contempt proceeding to apply well-settled principles of law to a conceded state of facts constituted an erroneous exercise of discretion, the standard of discretion being that defined in the Act, namely, to vindicate the rights secured

A. *The rule of law that an employer must bargain with a union which has lost its majority following the employer's unlawful refusal to bargain does not defeat the statutory mandate but fulfills it*

When the majority of the employees in an appropriate unit designates or selects a representative for purposes of collective bargaining, the Act requires that the employer bargain with the representative and with no other. *Medo Photo Corp.* v. *National Labor Relations Board*, 321 U.S. 678, 683-684; Sections 8(a) (5) and 9(a) of the Act. Early in the history of the Act, however, problems arose as to the impact upon the employer's statutory obligation of a change in the desires of the under it.

employees with respect to their choice of a bargaining representative following the employer's unlawful refusal to bargain with their freely chosen representative. That issue was squarely presented to this Court in the *Franks Bros.* case.

There, as here, the Board had issued an order requiring the employer to bargain with a union despite the claim that following the employer's unlawful refusal to bargain, the union, as a result of turnover among the employees in the unit, no longer represented a majority.[10] There, as here, it was urged that the Board order deprived employees who desired to change their bargaining representative of their statutory right of free choice. This Court ruled, however, that where a union's majority was dissipated after an employer's unfair labor practice in refusing to bargain with it, the Board could appropriately find that such conduct had undermined the prestige of the union and could require the employer to bargain with it for a reasonable period despite the loss of majority. The consequence of a contrary approach, the Court noted, would be to enable employers to "profit from a stubborn refusal to abide by the law" (321 U.S., at p. 705).

In addressing itself to the specific contention

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[10] In *Franks Bros.*, as in the instant case, the union had filed a petition for certification but when the employer's unfair labor practices made a free election impossible, the union withdrew its petition and instituted the unfair labor practice proceeding out of which the bargaining order arose. 321 U.S., at 702-703.

that a bargaining order under such circumstances involves an injustice to employees who may wish to substitute for the particular union some other bargaining agent or arrangement and, to that extent, negates the statutory guarantee of free choice. this Court, in language which is appropriate here, declared (at pp. 705-706):

> Contrary to petitioner's suggestion, this remedy, as embodied in a Board order, does not involve any injustice to employees who may wish to substitute for the particular union some other bargaining agent or arrangement. For a Board order which requires an employer to bargain with a designated union is not intended to fix a permanent bargaining relationship without regard to new situations that may develop. * * * But, as the remedy here in question recognizes, a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed. * * * After such a reasonable period the Board may, in a proper proceeding and upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships.

In support of this holding, this Court cited, *inter alia*, the decision of the Court of Appeals for the Fourth Circuit in *Great Southern Truck-*

ing Co. v. National Labor Relations Board, 139 F. 2d 984, certiorari denied, 322 U.S. 729, a case in square conflict with the decision below.[11] In that case, which arose out of an unfair labor practice strike following a wrongful refusal to bargain (127 F. 2d 180, 184), the employer contended in the contempt proceeding that it was relieved of its obligation to bargain under the decree because the union had lost majority status since the entry of the decree; it alleged that none of the strikers who had accepted reinstatement which had been offered pursuant to the decree were still in the company's employ and that a majority of the replacement employees had signed a petition stating that they did not desire to be represented by the union (139 F. 2d, at 985). There also, as here, the Board denied a company request to redetermine the union's majority status (*ibid.*). The Fourth Circuit rejected the contention and held the employer in contempt. Citing, among

[11] See also *West Texas Utilities Co. v. National Labor Relations Board*, 206 F. 2d 442, 449, certiorari denied, 346 U.S. 885, where the Court of Appeals for the District of Columbia Circuit rejected a contention made by way of "defense and counterclaim" that because of the receipt of petitions from employees showing, allegedly, that the union no longer represented a majority of the employees, the employer should not be held in civil contempt for disregarding the court's order to bargain. Like defenses were also recently rejected by the Court of Appeals for the Tenth Circuit in two unreported contempt cases, *National Labor Relations Board v. Conover Motor Co.* and *National Labor Relations Board v. Phelps Brothers Service Co.*, both orders entered April 23, 1953, and by the Court of Appeals for the Second Circuit in an unreported contempt case, *National Labor Relations Board v. Todd Co., Inc.*, order entered June 27, 1950, certiorari denied, 340 U.S. 864.

other decisions, the First Circuit's opinion in *National Labor Relations Board* v. *Franks Bros. Co.*, 137 F. 2d 989, subsequently affirmed by this Court, 321 U.S. 702, the court noted that the company's unlawful and protracted refusal to bargain with the union "necessarily must have had a telling impact" both with respect to maintaining the Union adherence of old employees [12] and with respect to obtaining new adherents from the incoming employees. Accordingly, the court held that "Inasmuch as the Company's own unlawful conduct created an atmosphere which made normal union growth and allegiance difficult, it will not now be permitted to urge its labor turnover and ensuing loss of union majority status as the basis for avoiding compliance with the remedial bargaining provision of our decree" (139 F. 2d, at 986).

Addressing itself further to the contention, given decisive weight by the court below, that an adjudication of contempt would have the effect of imposing upon employees a representative that they had specifically repudiated, the Fourth Circuit noted that under all the circumstances such a disavowal of the union could not be regarded as "a true expression of their unhampered will. On the contrary, it rather indicates that at long last,

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[12] As already noted, in the instant case the two original adherents of the Union (Smelley and Reives) who remained in the Company's employ finally repudiated the Union in November 1952, four years after its initial demand for recognition and bargaining, two years after the Board's order, and three months after the court decree (*supra*, pp. 4, 7, n. 5.)

after five years, the Company has been able successfully to thwart the employees' attempt to bargain collectively through representatives of their own untrammeled choice" (*ibid.*). Finally, the court noted that its disposition of the case did not grant the Union a permanent status as exclusive bargaining representative for any fixed period of time (at p. 987):

> *After the conditions of free choice have been restored by collective bargaining, in good faith on the part of the Company,* then should these employees desire to be represented by some body other than the Union, they may then avail themselves of the statutory procedure of the Act itself * * * in order to guarantee that their genuine desires can be ascertained and respected. But until the Company purges itself of its unlawful conduct in violating our decree, the employees' true desires "are matters of speculation and argument." [Emphasis in original.]

The principles thus set forth in *Great Southern Trucking* and approved by this Court in *Franks Bros.* were subsequently reaffirmed in *National Labor Relations Board* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, and were again approved in *Brooks* v. *National Labor Relations Board*, 348 U.S. 96.[13]

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[13] The issue in *Brooks* arose in a slightly different context. There 8 of the 13 employees in an appropriate unit designated a union as their bargaining representative in a Board-con-

B. *The court below misconceived its role in the administration of the Act, and its refusal in the contempt proceeding to apply well-settled principles of law to a conceded state of facts constituted an erroneous exercise of its discretionary power.*

As already noted, the court below recognized the foregoing principles when it issued its decree enforcing the Board's bargaining order despite respondent's claim of an intervening loss of majority. The legal situation changed in no wise thereafter.[13] Nevertheless, when the Board instituted contempt proceedings for failure to comply with the decree, the court below dismissed the contempt petition on the ground that "In such a proceeding the court determines for itself what order will best serve the public interest and at the same time

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ducted election. One week after the election and one day before formal certification, 9 of the 13 employees revoked their designation. Unlike *Franks Bros.* and the instant case, the employer in *Brooks* had engaged in no unfair labor practices to which the employee defection could be attributed. Nevertheless, this Court upheld the validity of a Board order requiring the employer to bargain with the union.

[14] The observation of the court below (R. 824) to the effect that "new evidence" may be considered in a contempt proceeding, whereas in an enforcement proceeding the Board's order must be affirmed or set aside on the basis of the record before the Board while, generally speaking, a valid statement of the law, has no relevance here. As the cases cited in the preceding section establish, loss of majority following an unlawful refusal to bargain is no defense to an enforcing decree whether that loss occurs prior to or after issuance of a Board order, or prior to or after a decree of enforcement.

vindicate its own decree . . . " (R. 82). We believe that in so doing, the court misapprehended its role in the statutory scheme devised by Congress to govern labor relations and overstepped the permissible boundaries of its contempt discretion.

I. The view of the court below that, in this contempt proceeding, the court itself was the sole arbiter of the relief which was appropriate under its enforcing decree, and that it was no longer bound by the considerations which prompted enforcement of the agency order, overlooks the essential relationship between court and agency in the administrative scheme. This Court long ago observed in *United States* v. *Morgan*, 307 U.S. 183, 191 (quoted with approval in *Hecht* v. *Bowles*, 321 U.S. 321, 330-331), that in such situations,

> . . . court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action.

More specifically, this Court has delineated the kind of "coordinated action" which the Act contemplates between the Board and the courts of ap-

peals both at the enforcement and contempt stages for the "attainment of the common end." Thus, in *National Labor Relations Board* v. *Bradford Dyeing Association*, 310 U.S. 318, the Court defined the duty of the Courts of Appeals, in respect of enforcement of Board orders as follows: (at pp. 342-343):

> Congress has placed the power to administer the National Labor Relations Act in the Labor Board, subject to the supervisory powers of the Courts of Appeals as the Act sets out. If the Board has acted within the compass of the power given it by Congress, has, on a charge of unfair labor practice * * * made findings based upon substantial evidence and has ordered an appropriate remedy, a like obedience to the statutory law on the part of the Court of Appeals requires the court to grant enforcement of the Board's order. Until granted such enforcement, the Board is powerless to act upon the parties before it. And the proper working of the scheme fashioned by Congress to determine industrial controversies fairly and peaceably demands that the courts quite as much as the administrative body act as Congress has required.

And see *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 269-270:

> The Board seeks enforcement as a public agent, not to give effect to a "private admin-

strative remedy." Both the order and the decree are aimed at the prevention of the unfair labor practice. If the decree of enforcement is disobeyed, the unfair labor practice is still not prevented.

The relationship between Board order and court decree in the statutory scheme precludes the assumption that a court discharges its duty under the Act when it enters an enforcing decree and that any action thereafter with respect to compelling obedience to that decree is solely a matter for its own unrestricted discretion. The authority of the court is derived from the Act, and the standard governing the exercise of its discretion is found in the provisions and policy of the Act. The reviewing court, like the Board, must take as its touchstone and objective the vindication of the rights secured by the Act. The decree, like the order it enforces, is aimed at the prevention of the unfair labor practice, the avowed objective of the Act, and so long as compliance is not forthcoming, that objective is frustrated. It is for this very reason that Congress from the beginning contemplated the judicial remedy of contempt as the ultimate sanction to secure compliance with Board orders. *National Labor Relations Board* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, 569; H. Conf. Rep. No. 1371, 74th Cong., 1st Sess., p. 5; cf. *Maggio* v. *Zeitz*, 333 U.S. 56, 68-69.

2. Quite apart from the fact that the court below misconceived its function in the administrative

scheme of the Act, its action here is contrary to general principles of equity jurisprudence." In essence, the position of the court below is that while entry of a decree enforcing the Board order was required by controlling law, that law no longer applied with respect to compelling compliance with the decree. In the court's view, the slate was wiped clean once it entered its own decree. On this premise, the court below could properly determine for itself how to vindicate its own decree or whether to vindicate it at all. On this premise, moreover, it could properly disregard well-settled principles of substantive law otherwise applicable. If the court below is correct in this, then the Board "has won a lawsuit and lost a cause" (*International Salt Co.* v. *United States*, 332 U.S. 392, 401). Indeed, the effect of the decision below is that contrary to the decision of this Court in *Franks Bros.*, the enforcement decree in this case need not, and perhaps should not, have issued in the first place, since there are no sanctions behind it.

The view that a court has such limitless discretion in the application of contempt sanctions has repeatedly been rejected by this Court. The basic doctrine was laid in *Union Tool Co.* v. *Wilson*, 259 U.S. 107, where this Court said (at p. 112):

> In the determination of the question whether an injunction has been violated and, if so, whether compensation shall be made to the injured party, there may be occasion for the ex-

ercise of judicial discretion; but the order to be entered in such a proceeding is not exclusively or necessarily a discretionary one. [Citing cases.] Moreover, legal discretion in such a case does not extend to a refusal to apply well-settled principles of law to a conceded state of facts.

The doctrine thus enunciated was more recently applied in a contempt proceeding instituted by a federal administrative agency in *Penfield Co. v. Securities and Exchange Commission*, 330 U.S. 585. In that case, the defendant was found guilty by a district court in civil contempt for failure to comply with a court order enforcing a subpena *duces tecum* issued by the Commission in aid of an authorized investigation. The district court imposed an unconditional fine but refused to grant remedial relief designed to compel production of the subpenaed documents. On appeal to the Ninth Circuit, the court of appeals ruled that the imposition of the unconditional fine was error and directed that the defendant be imprisoned until he produced the documents (157 F. 2d 65). Affirming the decision of the court of appeals, this Court stated (330 U.S. at 590-592):

> The Act gives the Commission authority to require the production of books and records in the course of its investigations. And in absence of a basis for saying that its demand exceeds lawful limits [citation omitted], it is entitled to the aid of the court in obtaining

them. A refusal of the court to enforce its prior order for the production of the documents denies the Commission that statutory relief. * * *

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* * * We agree with the Circuit Court of Appeals that * * * the refusal of the District Court to grant the full remedial relief which the Act places behind the orders of the Commission was an abuse of discretion.

In the recent case of *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, a contempt proceeding instituted by the Wage and Hour Administrator for violation of a prior decree, this Court, reversing the court below, reemphasized the limitation on a court's discretion to grant or withhold remedial relief. The Court noted that (at p. 191):

> The force and vitality of judicial decrees derive from more robust sanctions. And the grant or withholding of remedial relief is not wholly discretionary with the judge * * * [citing *Union Tool, supra*]. The private or public rights that the decree sought to protect are an important measure of the remedy.

In this connection, it is appropriate to observe that, contrary to the view expressed by the court below (R. 82), "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are

involved." *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515, 552.

Where, as here, the only justification proffered for the admitted refusal to comply with the bargaining provision of the prior decree was an alleged loss of majority which followed upon a lawful refusal to bargain, a defense which on "well-settled principles" (*Union Tool, supra*) was not a bar to a decree of enforcement, withholding of appropriate remedial relief exceeded the allowable limits of th court's discretion. Accord: *Parker* v. *United States*, 153 F. 2d 66, 70 (C. A. 1); *Sauber* v. *Whetstone*, 199 F. 2d 520, 523 (C. A. 7).[15] "After all, no more is involved than whether what the law already condemned, the court shall forbid; and the fact that its judgment adds to existing sanctions that of punishment for contempt is not a circumstance to which a court will ordinarily lend a friendly ear." *National Labor Relations Board* v. *General Motors Corp.*, 179 F. 2d 221, 222 (C. A. 2).

The suggestion in the decision below that respondent acted "in good faith" in declining to

[15] Standards for enforcement of Board orders and for finding civil contempt may, of course, vary in other respects. Thus, compliance with a Board order, while not a bar to enforcement, would be a complete defense to a civil contempt action. These standards may not vary, however, with respect to an employer's obligation to remedy his prior wrongful refusal to bargain where the sole defense is no more than a continuation of that wrongful conduct and a renewed attempt to reap the benefits of that refusal because of the defection of union adherents which may well have been caused by such wrongful conduct. To tolerate such a procedure would truly be "to foster experimentation with disobedience" (*Maggio* v. *Zeitz*, 333 U. S. 56, 69).

bargain with the Union is answered by *Jacksonville Paper Co., supra*, where this Court declared (at p. 191):

> The absence of wilfulness does not relieve from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance. * * * Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act. The decree was not fashioned so as to grant or withhold its benefits dependent on the state of mind of respondents.[16]

[16] The further observation of the court below (R. 81-82) that contempt would not lie "where it appears, as here, that the board, by refusing to consider or otherwise lend its assistance to the decertification petition, and not the respondent, is responsible for the situation which now exists" is wholly lacking in merit. Under *Franks Bros., supra*, the Board was under no obligation to "take steps, in recognition of changed situations which might make appropriate changed bargaining relationships" until respondent had made a good faith effort to remedy its illegal refusal to bargain with the Union. In situations comparable to the instant case, the Board holds that the only purpose of the bargaining order is to remedy the antecedent refusal to bargain and that once this purpose has been achieved the order has no further effect. Accordingly, where after the entry of a decree enforcing such an order the employer bargains in good faith for a reasonable time, the Board deems the employer's obligation under the decree to have been discharged. *Squirrel Brand Co., Inc.*, 104 NLRB 289, 290-291; *Northwestern Photo Engraving Co.*, 106 NLRB 1067, 1068-1069.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed.

SIMON E. SOBELOFF,
Solicitor General.

THEOPHIL C. KAMMHOLZ,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
DOMINICK L. MANOLI,
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National Labor Relations Board.

AUGUST 1955.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are as follows:

UNFAIR LABOR PRACTICES

SEC. 8(a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in

effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and

proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

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In The Supreme Court Of The United States

OCTOBER TERM, 1954

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

THE WARREN COMPANY, INCORPORATED

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN WESLEY WEEKES
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In The Supreme Court Of The United States

OCTOBER TERM, 1954

NO._____

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

THE WARREN COMPANY, INCORPORATED

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THE STATUTE INVOLVED

Not only are relevant the provisions of the section of the Statute cited by the Solicitor General, but very revelant are the provisions of Sec. 9(a) (c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 USC 151, et seq.), set forth as follows:

"Sec. 9 (a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment; . . .

(c). (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i)

wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in Section 9 (a), or (ii) *assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in Sec. 9 (a);* or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a); a

The Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists *shall provide for an appropriate hearing upon due notice.* Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof. . . .

(3) No election shall be directed in any bargaining unit or any subdivision within which, *in the preceding twelve month period, a valid election shall have been held . . .*"

STATEMENT OF THE CASE

The statement of the case submitted by the Solicitor General is substantially correct. Respondent would clarify certain portions thereof.

There has never been at any time a Board conducted election for certification or decertification of the Union at Respondent's plant.

On petition to adjudicate the Company in civil contempt for refusing to comply with the decree, the Company not only reiterated the defense of the Union's loss of a majority, but asserted that it had in all good faith complied with all of the provisions of the decree in that it had posted notices, had reinstated certain employees, had paid back wages to those certain employees, had ceased and desisted from the practices prohibited by the decree, and had sought, in all good faith, through all legal processes the determination of the majority status of the Union. These requests for a fair determination of this status through the facilities of a Board-conducted and supervised election were flatly denied by the Board.

On November 23, 1948 the Union filed with the Board a Petition for Certification as the Bargaining Representative of Respondent's employees (appendix to Petitioner's Brief 171). An agreement for a consent election was entered into between the Respondent and the Union on January 5, 1949 (appendix to Petitioner's Brief, 87). On January 8, 1949 the Union withdrew its consent (app. to Petitioner's Brief, 88) *and the election was never held.* Subsequently, unfair practice charges were filed by the Union, and, after a hearing thereon the Board ordered the Company to recognize the Union as the Bargaining Agent *on the basis of card designations.* Respondent was adjudged by the Board as guilty of certain unfair practices, including discriminatory discharges and failure to bargain, and the Court entered its Enforcement Order. Respondent had complied with the Court's decree by the posting of notices, the reinstatement of certain designated employees, the payment to them of back wages, and had met for bargaining as described in the Petition to this Court. A petition signed by five out of six employees

involved informed Respondent that it was the desire of these employees that the Union no longer be recognized as their bargaining agent. Respondent petitioned the Board to hold an election to determine the status. The Board refused. Respondent declined to bargain further. The Board petitioned the Fifth Circuit Court of Appeals to find Respondent in Contempt, principally on the ground that it had failed to bargain. The Court absolved Respondent and dismissed the Petition.

REASONS FOR DENYING THE WRIT

1. The Court did not disregard well-settled principles of substantive law.

No election had ever been held. Recognition was ordered by the Board on the basis of card designations. The rule requiring recognition of the Union for a twelve month period cited by the Board, applies under the statute only where "a valid election shall have been held."

In the recent case of BROOKS VS. NATIONAL LABOR RELATIONS BOARD, decided December 6, 1954, this Court upheld the Board's formula: "A certification, *if based on a Board conducted election*, must be honored for a reasonable period, ordinarily 'one year' in the absence of unusual circumstances." And in the footnote in this case the Court says "Both before and after the Taft-Hartley Act, the Board and the Courts did not apply the rule to a collective bargaining relationship established *other than as the result of a certification election*, citing Joe Heaun, 66 N.L.R.B. 1276, (card check); Labor Board vs. Mayer, 196 Fed. (2d) 286 (card check); Squirrel Brand Co., 104 N.L.R.B. 289, (order to bargain)." In the Mayer case, cited by this Court, the Board refused an election, certified the Union on the basis of a card check,

and ordered bargaining. The Court denied enforcement.

2. Not being based on the same statute, the decision below is not in conflict with the ruling of the Court of Appeals for the Fourth Circuit in Great Southern Trucking Co. vs. National Labor Relations Board, 139 Fed. (2d) 984, certiorari denied, 322 U.S. 729. The Trucking Co. case based on the 1935 Statute was decided on January 10, 1944, and certiorari denied by this Court on April 24, 1944, three years before the passage of the "Labor Management Relations Act of 1947," which incorporated the above cited amendments providing the twelve month period between elections, and providing certification and decertification elections. Decertification elections were permitted where employees asserted the bargaining agent was no longer their representative. (Secs. 9a and c).

Upon the Board's refusal to hold an election, in accordance with the Act, to determine the majority status, it became proper for the Court to inquire whether the Board's action had been arbitrary and capricious, and to deny the contempt petition on the facts presented.

3. The Circuit Court did not abuse its discretion in dismissing the Petition for Contempt.

It is recognized that a Court of superior jurisdiction may review the decision of one of inferior jurisdiction on a matter of contempt. But the action of the lower Court as to matters in its judicial discretion will not be disturbed unless there is a clear and gross abuse thereof. (2 Amer. Juris. p. 917).

This Court has consistently refused to review the judgments of lower Courts on petitions for contempt arising from alleged disobedience of orders of enforce-

ment under the Labor Management Relations Act of 1947 and its predecessor, the Wagner Act.

West Texas Utilities Co. vs. N.L.R.B., 206 Fed. (2d) 442-449, Cert. denied 346 U.S. 885.

N.L.R.B. vs. Express Publishing Co. (5th Circ.), Not in contempt. 128 Fed. (2d) 690, Cert. denied —317 U.S. 676.

Great Southern Trucking Co. vs. N.L.R.B., 139 Fed. (2d) 984; Cert. denied 322 U.S. 729.

Reed & Prince Manufacturing Co. vs. National Labor Relations Board, (not in contempt), 205 Fed. (2d) 131—1st Circ.—Cert. denied, 346 U.S. 887.

While the right of review is recognized, it is said that "it belongs exclusively to the Court offended to judge of contempt; and no other Court or Judge can or ought to undertake, in a collateral way, to question or review an adjudication of contempt made by another competent jurisdiction." (Anderson vs. Dunn 6 Wheat (U.S.) 204, 5 L.Ed. 242.

Contempt can be found only if the Circuit Court was offended by the acts of Respondent. Because of the circumstances that Court did not feel offended, but on the other hand felt that it "would stultify itself, its decree and do violence to the Act if it ordered the employer to force upon its employees as bargaining agent a Union not of their own choosing merely because some six years before the Board had ordered the employer to recognize it as bargaining agent for its then employees."

It was never the intent of Congress to force an employer to bargain with a Union which is not the choice of the employees, has never been certified as the result

of a Board conducted election, and has been repudiated by the employees. Due processes prescribed by the Congress for the fair determination of the bargaining agent have been denied the employees and the employer. The agency should exist. To punish a Respondent for failure to bargain with a Union which is not the agent would be a mockery of justice. The Circuit Court did not abuse its discretion.

CONCLUSION

For the above reasons it is respectfully submitted that the petition for the writ of certiorari should be denied.

Respectfully submitted.

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P. O. Box 250
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January 1955

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 27

National Labor Relations Board, Petitioner

vs.

The Warren Company, Incorporated

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT, THE WARREN COMPANY, INCORPORATED.

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N. L. R. B. vs. Poultry Enterprises, Inc., 207 Fed (2d) 522.

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N. L. R. B. vs. Bradley Washfountain Co., 192 Fed (2) 144.

Great Southern Trucking Co. vs. N. L. R. B., 139 Fed (2) 984, 322 U.S. 729.

Vulcan Forging Co., 188 Fed (2) 927.

13 C. J., 16.

In the

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National Labor Relations Board, Petitioner

vs.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT, THE WARREN COMPANY, INCORPORATED

I

THE STATUTE INVOLVED

The provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, et seq) which are printed in the Petitioner's brief (Appendix pp 31-33) are relevant. Other relevant provisions of this Statute are printed below:

"Section 1. (b) . . . It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, *to protect the rights of individual employees in the relations with labor organizations . . .*"

"Section 101: . . . It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining, and *by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing*, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

"Section 7: Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and *shall also have the right to refrain from any or all of such activities.*"

"Section 8 (a): It shall be an unfair labor practice for an employer—

(1) *to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.*"

"Section 9 (a). Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . .

(c). (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in Section 9 (a), or (ii) *assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in Sec. 9 (a);* or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

The Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall ~~not~~ make any recommendations with respect thereto. *If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof . . .*

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve month period, a valid election shall have been held . . ."

II

STATEMENT OF THE CASE

There has never been at any time a Board conducted election for certification or decertification of the Union

at Respondent's plant: On petition to adjudicate the Company in civil contempt for refusing to comply with the decree, the Company asserted that it had in all good faith complied with all of the provisions of the decree in that it had posted notices, had reinstated certain employees, had paid back wages to those certain employees, had ceased and desisted from the practices prohibited by the decree, and had sought, in all good faith, through all legal processes the determination of the majority status of the Union. These requests for a fair determination of this status through the facilities of a Board-conducted and supervised election were flatly denied by the Board. *After the enforcement decree* the Company had received a voluntary written notice from five (5) of its six (6) employees in the unit that they did not belong to the Union and did not want it as their representative.

On November 23, 1948 the Union filed with the Board a Petition for Certification as the Bargaining Representative of Respondent's employees. An agreement for a consent election was entered into between the Respondent and the Union on January 5, 1949. On January 8, 1949 the Union withdrew its consent and *the election was never held.* Subsequently, unfair practice charges were filed by the Union, and, after a hearing thereon the Board ordered the Company to recognize the Union as the Bargaining Agent *on the basis of card designations.* Respondent was adjudged by the Board as guilty of certain unfair practices, including discriminatory discharges and failure to bargain, and the Court entered its Enforcement Order, citing as authority the case of *NLRB vs. Mexia Textile Mills* (339 U.S. 563), wherein an enforcement order was declared to be proper even though there had been

compliance. Respondent had complied with the Court's decree by the posting of notices, the reinstatement of certain designated employees, the payment to them of back wages, had met for bargaining as described in the Petition to this Court, had furnished wage information (R 36); and had offered to bargain, but requested proof of the Union's majority. A petition signed by five out of six employees involved informed Respondent that it was the desire of these employees that the Union no longer be recognized as their bargaining agent (R 72 Exh A). Respondent petitioned the Board to hold an election to determine the status (R 69). The Board refused. (R 70). New circumstances in the submission by the employees of a written repudiation of the Union, and a refusal of the Board's processes, as above related, had arisen since the enforcement decree. The Board petitioned the Fifth Circuit Court of Appeals to find Respondent in Contempt, principally on the ground that it had failed to bargain. (R 7). The Court absolved Respondent and dismissed the Petition. (R 77).

III

ARGUMENT

Never, at any time, has there been a Board conducted election to determine if the Union represented any or a majority of the employees in Respondent's plant. This is true although the Board repeatedly has been requested and petitioned to hold an election. Without this assistance to determine fairly the agency, the Respondent had no recourse other than to accept the voluntary written statement of its employees to the effect that they did not want to be represented by a Union. If an agency ever existed it was revoked. To have bargained further with a Union *not* the representa-

tive of the employees would have been violative of the letter and spirit of the Act. This Court in *Brooks vs. NLRB*, 348 U. S. 96 has held that it was the "responsibility of the employer to petition the Board" for a fair determination of the question. This responsibility was met by Respondent but the Board arbitrarily refused to lend its assistance.

(a) Distinction Between Enforcement and Contempt Proceedings.

There is a marked distinction between the relief sought and afforded in an enforcement case before the Circuit Courts and the relief sought and afforded in a contempt case. The lower Court was correct in saying "entirely different considerations apply." This Court in the ruling in *NLRB vs. Mexia Textile Mills* 339 U. S. 563 and other cases has held that the Board is entitled to an enforcement decree regardless of the fact that its own order has been complied with in every respect. And if the Board issued its order on findings based on substantial evidence, these findings could not be disturbed by the Court. In contempt proceedings the Court may look to the acts and attitude of the Respondent with respect to its own decree. In the instant case new circumstances had arisen since the issuance of the enforcement order. Respondent had been confronted with a voluntary written direction from its employees not to deal with the Union as their reprsentative. Following receipt of this notice Respondent sought the processes of the Board for a fair and orderly determination of the question of agency (R 69). These processes were arbitrarily denied Respondent. (R 72 Ex. B; R 70.) The lower Court in its opinion granting the enforcement decree specifically held that it was required to grant the decree regardless of compliance, and that

loss of a majority could not be urged as a defense in an enforcement proceeding. (R 2). The implication could be drawn that it could be urged later, and the Court's own precedent in the case of *NLRB vs. Aldora Mills* 197 Fed. (2d) 266 would support this implication.

"Board's order does not fix a permanent bargaining relationship without regard to new situations that may develop." *Franks Bros. Co. vs. NLRB* 321 U. S. 702.

(b) Brooks case not applicable.

In the recent case of *Brooks vs. NLRB*, 348 U. S. 96, this Court upholding the Board's twelve month formula said: "A certification, *if based on a Board conducted election*, must be honored for a reasonable period, ordinarily 'one year' *in the absence of unusual circumstances.*" And in the footnote in this case the Court says "Both before and after the Taft-Hartley Act, the Board and the Courts did not apply the rule to a collective bargaining relationship established *other than as the result of a certification election*, citing Joe Hearin, 66 NLRB, 1276 (card check); NLRB vs. Mayer, 196 Fed. (2d) 286 (card check); Squirrel Brand Co., 104 NLRB 289, (order to bargain)." In the Mayer case, cited by this Court, the Board refused an election, certified the Union on the basis of a card check, and ordered bargaining. The Court denied enforcement.

(c) Respondent followed law and precedent.

In the instant case there is no unfair labor practice to which the employee defection can be attributed. Immediately after the enforcement decree the Respondent offered to bargain, but it was immediately confronted with voluntary written repudiation of the Union by the employees. Nowhere is it claimed in the contempt petition that the repudiation was instigated

by the Respondent, and nowhere is it controverted that the repudiation was an entirely voluntary act on the part of the employees expressing their free choice.

From the earliest decisions under the Wagner Act to the latest decisions under the Labor Management Relations Act, the Courts have zealously guarded the rights of the employees and have sought to have their wishes determined fairly. They have endeavored not to force upon the employees a bargaining agent not of their choosing. They have expressly stated that *for an employer to deal with a Union not the choice of the employees would be an unfair practice.*

NLRB vs. Poultry Enterprises, Inc.
207 Fed. (2d) 522

Mid-Continent Petroleum
204 Fed (2) 613
Cert. denied 346 U. S. 856

NLRB vs. Mayer
196 Fed. (2) 286

NLRB vs. Vulcan Forging Co.
188 Fed. (2) 927

NLRB vs. Aldora Mills
197 Fed. (2) 266

"Whenever the will of the employees to revoke the power of their bargaining agent is clear and unquestioned, effect must be given under the Act to such revocation." This principle is upheld in all of the above cases.

Respondent contended that it had complied with every portion of the Court's decree, even before its entry, but that it had not bargained to a conclusion a

contract with the Union. Respondent repeatedly called to the attention of the Union, the Board, and the Court, in the enforcements proceedings, the Union's lack of a majority. After the decree Respondent was requested in writing by five out of the six employees involved not to recognize the Union. Respondent petitioned the Board to clarify the situation and call an election to determine the status of the bargaining agent. The Board refused to call an election, stating it was the policy of the Board to recognize the Agent, regardless of circumstances, for a period of one year after certification. There is no authority in the statute for such policy under such circumstances.

The situation in this case is identical with that in *NLRB vs. Aldora Mills*, 197 Fed. (2d) 266, on contempt, before the 5th Circuit Court. There the employees petitioned for decertification and the Board refused to process the petition because the year had not elapsed from the date of certification. Just as this Respondent did, they refused to bargain. The Court dismissed the Contempt Proceedings. The Court held:

> "Our examination of the record made in this proceeding . . . and of the controlling decisions, leaves us in no doubt that the Respondent in declining to continue bargaining with the Union as ordered by our decree, acted in the utmost good faith and in the sound belief engendered by the decertification petitions and the notices and information it had received from its employees that it was proper under the Act and our decree for it to do so."

See also:

NLRB vs. Inter City Advertising Co., Inc.
154 Fed. (2) 244;

The same ruling was made in *Mid-Continent Petroleum Corporation vs. NLRB*, 204 Fed. (2) 613, certiorari denied by the Supreme Court, 346 U. S. 856. There the Court held there was no statutory authority for holding the certification valid for one year regardless of the wishes of the employees to revoke the bargaining agency.

NLRB vs. Appalachian Electric Power Co.
140 Fed. (2) 217;

NLRB vs. Century Oxford Mfg. Corp.
140 Fed. (2) 541.

In *NLRB vs. Mayer*, 196 Fed. (2) 286, the Court held:

> "If we should compel Respondent to bargain further with this Union, which the employees themselves have obviously repudiated, the result would be to deny them the right secured by the Act to bargain thru the representative of their choice. The choice has been made by the employees in a manner which does not admit of dispute. We see no reason why the employer cannot accede to the wishes of his employees and discontinue dealing with it."

In *NLRB vs. Bradley Washfountain Co*, 192 Fed. (2) 144, it was held that "the company was guilty of no unfair labor practice in refusing to bargain with the Union after it had learned that a majority of its members had voluntarily disclaimed a desire to be connected with it any longer, and that it would rob the National Labor Relations Act of all realities and practicalities to continue to recognize such Union as the bargaining agency."

An agency, not coupled with an interest, can be revoked at any time by the principal.

The law was well settled at the time.

(d) Great Southern case overruled by statute and decision.

The Board lays great emphasis on the decision of *Great Southern Trucking Co. vs. NLRB* 139 Fed. (2d) 984, certiorari denied, 322 U. S. 729. This case based on the 1935 Statute was decided Jan. 10, 1944, and certiorari denied by this Court on April 24, 1944, three years before the passage of the "Labor Management Relations Act of 1947" whose declared policy in Sections 1b and 7 was to protect the wishes of the employees and to provide for "the right of (the employee) to refrain from any or all of such activities (union membership)." These sections were not incorporated in the 1935 Statute under which the Great Southern Trucking Co. case was decided. Neither were those provisions incorporated in the 1935 Act which are found in the 1947 Statute in Sec. 9 (c) (i) Aii, providing for the decertification of the Union, and requiring the Board to hold an election if it has cause to believe a representation question affecting commerce had arisen. In the instant case how could the Board have believed otherwise? The Commerce feature was present. The petition by the employees had been filed.

The Great Southern Trucking Co. case was under an older statute wherein the right of the free expression of the employees was not so closely guarded.

Under the new statute this Court in denying certiorari in the case of *Mid-Continent Petroleum Corporation vs. NLRB*, 204 Fed. (2d) 613, (cert. denied 346 U. S. 856), overruled the holding in the Great

Southern Trucking Co. case, and the Fifth Circuit followed the established law in refusing to find this Respondent in contempt. Respondent had followed the law. It had not violated Sec. 8 (a) 1 of the new Act for it did not "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7," one of which rights was "to refrain from any or all of such activities," the activities being self-organization and to form, join, or assist labor organizations, to bargain collectively through *representatives of their own choosing.*" Had Respondent followed a different course of conduct it would have violated the Act. Not only was the course of conduct approved by this Court in denying certiorari in the Mid-Continent case, but the same ruling had been followed by the Circuit Courts in *NLRB vs. Mayer* 196 Fed. (2d) 286, *NLRB vs. Vulcan Forging Co.* 188 Fed. (2d) 927, *NLRB vs. Aldora Mills* 197 Fed (2d) 266..

Could the Respondent be held in contempt when it had followed a course of conduct which had been approved by the Courts, and particularly its own Circuit? Could it be in contempt for following the law as it was then written and as it was then interpreted? This was before the decision in *Brooks vs. NLRB*, 348 U. S. 96 ,but it is insisted that the Brooks case is not controlling even now, since there had been an election in the Brooks case and not one in the instant case.

Did the lower Court abuse its discretion in refusing to find Respondent in contempt when it followed the law as it had then been interpreted?

Contempt is a harsh remedy. It implies that the Respondent totally disregarded the Court's decree. Here Respondent had complied with every portion of the

decree with the possible exception of bargaining. In that instance it had offered to bargain and had bargained to a limited extent, and had sought to comply with the law as written and as then interpreted. The judgment of the trial court recites all the facts constituting the alleged contempt. "Change of conditions subsequent to the making of a court order may constitute sufficient justification for disregarding such order." 13 C. J. 16.

Respondent did not offend the lower Court, and it so stated. Unless the lower Court abused its discretion, its judgment cannot be disturbed.

The opinion of the lower Court is the ablest argument that can be presented in support of the dismissal of the contempt petition.

IV

CONCLUSION

It is respectfully submitted that the Fifth Circuit did not abuse its discretion and that its decree should be affirmed.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 27

National Labor Relations Board, Petitioner

Vs.

The Warren Company, Incorporated

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENT, THE WARREN COMPANY, INCORPORATED.

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treat its refusal (to bargain) *as a contempt, until after the Board has certified the result.*"

In *National Labor Relations Board Vs. National Licorice* 104 Fed.(2d) 655, C.C.A.2d, decided June 12, 1939, the same Court entered an enforcement order conditioned upon the Board's holding a new election to determine the majority status of the contending union. The Court said, "The workmen are few and an election will not be an onerous condition." This procedure was approved by this Court when the case was before it on review. (309 U.S. 350.)

In *Hamilton Brown Shoe Co. Vs. National Labor Relations Board*, 104 Fed.(2d) 49, decided May 29, 1939 by the 8th Circuit, an enforcement order was entered, but the Court directed the Board to hold an election. The Court said: "We are of the view that it would be arbitrary and unfair, and not in keeping with either the letter or the spirit of the Act to require the employer and its employees to conduct their negotiations through an agency not fairly representing a majority of the employees. In the face of the record as it now stands, it cannot be assured that the Union is now the accredited representative of the employees."

Cupples Co. Mfrs. Vs. National Labor Relations Board, decided August 1, 1939 (C.C.A.8th), 106 Fed. (2d) 100:

> "The Board apparently has all the power and machinery which it needs for ascertaining, through an honest election by secret ballot, held under its direction whether this Union . . . is in fact the chosen representative of the employees."

In *Stewart Die Casting Vs. National Labor Relations Board*, 114 Fed.(2d) 849, decided July 3, 1940 (C.C.A.7th), the Court conditioned enforcement on a

Board conducted election, saying: "We think our authority to impose such a requirement is found in Fansteel Metallurgical, 2 27 39, 306 U.S. 240, and National Licorice 3 4 40, 309 U.S. 350. We should think the Union itself would welcome an opportunity to demonstrate that it represents a majority and we see no reason why the Board should object. We are not unmindful of the familiar argument advanced by the Board that a fair election cannot be had until the last vestige of unfair labor practices has been removed as required by the Board's order. In other words, so it is argued, the unfair acts on the part of the employer create in the employee a state of mind which prevents a free expression of opinion on his part. To us this argument is imaginary rather than real. In fact, the opposite effect, if any, would be the natural result. We accord to the ordinary employee intelligence such as will enable him to know when he is being imposed upon by his employer, as well as the ability to properly protect his own interest in an election conducted by secret ballot, for the purpose of determining whom he desires as his bargaining agent."

What could have been the purpose of Congress in the adoption of the above amendments to the Act if it were not the purpose to guarantee beyond the possible contrary determination by the Board the absolute freedom of choice by the employees. This freedom was to be unencumbered and unhampered by any arbitrary or doctrinal regulation of a Board which might, in interpreting the law, consider itself as being created for the sole function of protecting a Union — and not the employee. The Congress was clear and positive in its amendments. The history of the old Board and its rulings were before it. It sought to correct the abuses of the employees. Under the old law employees who

wanted no union had no machinery which they could set in motion to repudiate a Union. The new law gave that machinery. Congress required the Board to hold inviolate the freedom of choice through a secret ballot given those employees. To force an agent upon them not of the choosing of the employees, and to deny them the statutory method of secretly stating their preference was violative of the expressed intent of Congress.

II.

CONCLUSION

It is respectfully urged that the Court consider the above history of the amendments to the Act.

Respectfully submitted,

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Counsel for Respondent

P. O. Box 250,
Decatur, Georgia
October, 1955.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 27

National Labor Relations Board, Petitioner

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENT, THE WARREN COMPANY, INCORPORATED.

I.

The Intent of Congress Revealed in the Amendments to the Wagner Act in Passing the 1947 Labor-Management Relations Act.

Supplementing its brief in chief, Respondent desires to call to the Court's attention the evident intention of Congress in adopting certain amendments in the year 1947 to the existing labor law.

The intent and purpose of the Act and the amendments was the protection not of the employer or the Union, but of the employee. It was never the purpose of the Congress to thwart the desire of the employees to be represented or not to be represented by a Union.

The Congress attempted to place every safeguard to insure the freedom of choice of the employee. The employees were to be represented by an Agent of their own choosing, and none other. And the selection of that representative was to be safeguarded through processes initiated by the Government granting a secret ballot. If those employees desired no bargaining agent, they were given that prerogative by the Congress. This is first guaranteed in Section 7 of the Act wherein it is expressly provided: "Employees shall have the right to self-organization, to form, join or assist labor organizations, *to bargain collectively through representatives of their own choosing*, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and *shall also have the right to refrain from any or all of such activities . . .*"

This latter part of Section 7, insuring the right to refrain from such activities, was not in the original Wagner Act, but was added in the Act of 1947. While the Section, together with the policy set forth in Section 1, would seem to favor collective bargaining as a National Labor Relations policy, yet the amended Act would seek to give the employee absolute freedom of choice — to choose whether or not he will be a part and parcel of collective bargaining.

The House and Senate Conference Report on June 3, 1947 (Page B-9 The New Labor Law, Bureau of National Affairs) said of Section 7 and its amendment: "Both the House Bill and the Senate amendment in amending the National Labor Relations Act preserved the right under Section 7 of that act of employees to self-organization (etc.) . . : The House Bill made two changes in that Section . . . (Second), it was specifically set forth that employees were also to have the

right to refrain from self-organization, etc., if they chose to do so. . . ."

Conference Report (Page B-18, The New Labor Law): "It must be emphasized that one of the principal purposes of the National Labor Relations Act is to *give employees full freedom to choose or not to choose representatives* for collective bargaining. As has already been pointed out in the discussion of Section 7 the Conference Agreement guarantees in express terms the right of employees to refrain from collective bargaining or concerted activities if they chose to do so."

The Senate Labor Committee Report (Page C-3):

> "The major changes which the bill would make in the National Labor Relations Act may be summarized as follows: (5) In the interests of assuring complete freedom of choice to employees who do not wish to be represented collectively as well as those who do, *it requires* the Board to *enlarge* the rights of petition in representation cases . . ."

The right to choose a Union or to repudiate a Union through the means of an election was to be unencumbered, where there had been no *valid election* within the preceding twelve months. There was to be no hindrance to the right of petition of employees for an election where they had never been granted an election to determine their wishes.

The new Act sought in every way to secure that right to choose or repudiate a bargaining agent. Under Section 9 (c) (1) an election may be sought by the employees to rescind a Union's right to represent employees. This should be true at any time, especially where there has never been an election to determine the representative status, and it seemingly was not the

intention of Congress that the employees should be arbitrarily denied the right of rescission by the Board.

Section 9 (c) (1) of the Wagner Act which gave the Board complete discretion in investigating representation petitions was amended to limit that discretion by *requiring* the Board "to investigate petitions filed by . . . a group of employees who assert that the labor organization formerly certified as bargaining agent no longer represent a majority of employees. . . ."

The prohibition against entertaining a petition seeking an election for certification or decertification only applies when a *valid election* has been held within the preceding twelve months. The Conference Committee's report stresses the requirement of a valid election within the twelve month period before the processes of a Board conducted election for decertification could be denied. Page B-20 Conference Report: "Under the House Bill, in Section 9 (f) (7) it was provided that no election could be directed in any bargaining unit or any subdivision hereof within which, in the preceding twelve month period, a *valid election* had been held, except upon a petition by employees requesting decertification of a representative. The Senate amendment, in Section 9 (c) (3), contained a similar provision without the exception. The conference committee adopts the provisions of the Senate amendment."

Thus it will be seen that the House desired decertification petitions processed at any time regardless of circumstances. But the House and Senate came to agreement that the processes could be denied within the 12 month period only after a *valid* election had been held in that period.

The Conference Report further elaborates on this Section 9 (c). Page B-20: "Both the House Bill and the

Senate Amendment in Section 9 (c) of the amended Labor Act provided that petitions under Section 9 could be filed by . . . employees . . . wishing to provide for the decertification of an existing representative . . . Investigations of such petitions under the House Bill were conducted by the Administrator provided in the House Bill. Under the Senate Amendment investigations were conducted by the Board. *Both under the House Bill and the Senate Amendment if there was reasonable cause to believe that a question of representation affecting commerce existed a hearing was to be held.* Both the House Bill and the Senate amendmend provided that if the Board found upon the hearing that a question of representation existed a secret ballot should be held and the results thereof certified."

The Senate Labor Committee's Report (80th Congress, 1st Session, Report No. 105, Calendar No. 104) on the Labor Relations Act of 1947, submitted April 17, 1947 (Page C-3 The New Labor Law—BNA) says that "the major changes which the bill would make in the National Labor Relations Act may be summarized as follows: . . . (5). In the interest of assuring complete freedom of choice to employees who do not wish to be represented collectively as well as those who do, *it requires the Board to enlarge the rights of petition in representation cases . . .*" Continuing, in its discussion of Reform in Representation Proceedings, the Report says (Page C-10 The New Labor Law—BNA): "The present Act contains virtually no directions as to how representation proceedings are to be conducted . . . Many of the current procedures developed administratively are properly subject to the criticism that the Board has made collective bargaining a 'one-way street.' *Despite the absence of discriminatory language in the Act, the Board refused to entertain peti-*

tions filed by employees who wish to demonstrate that the current or asserted bargaining representative is not the choice of the majority. The only relief for employees suffering from representation by a radical or racketeering union is to file a petition designating another union as their representative. . . . *The Committee Bill would make it necessary for the Board to entertain petitions from employees irrespective of the kind of relief sought.* . . . The present Board rules also discriminate against employers who have reasonable grounds for believing that labor organizations claiming to represent their employees are really not the choice of the majority. It is true that where an employer is confronted with conflicting claims by two or more labor organizations he may file a petition. But where only one union is in the picture, the Board denies him that right. . . . The one sided character of the Board's rules has been defended on the ground that if an employer could petition at any time, he could effectively frustrate the desire of his employees to organize by asking for an election on the first day that a Union organizer distributed leaflets at his plant. It should be noted that this may be a valid argument for placing some limitation upon an employer's right to petition, but it is no justification for denying it entirely. The Committee has recognized this argument insofar as it has point, by giving employers a right to file a petition but not until a Union has actually claimed a majority or demanded exclusive recognition. It should be observed that this amendment, like the amendment doing away with the disparity of treatment on employee petitions, does not impair the Board's discretion to dismiss petitions by employers where the existence of an outstanding collective agreement or some other special condition makes an election at that time inappropriate."

The Senate Labor Committee's Report on this section of the bill which became enacted, clearly outlines its provisions and conclusively proves by its contents that the Board acted arbitrarily and in violation of the statute in refusing to process the petition for decertification in the case at bar: (Page C-24 The New Labor Law—BNA) Section 9 (c) (1): "This permits employees to file petitions — to deprive of exclusive representative status one currently recognized by their employer as certified as their representative. Employers *are also given the right of petition after a Union has actually claimed a majority* or demanded exclusive recognition. Neither of these amendments affects the present Board's rules of decisions with respect to dismissal of petitions *by reason of an inadequate showing of representation* or the existence of an outstanding collective agreement as a bar to an election. In other words, the Board could dismiss an employee or employer's petition if a valid contract were still in effect."

It would appear from the above Report that the Board would be justified in dismissing the petition for decertification only (1) if a valid contract were still in effect, or (2) if there was an inadequate showing of representation. In the case at bar, there was no contract, and there had been adequate showing of representation since it is uncontroverted that five of the six employees affected voluntarily requested that the Union no longer be recognized as agent.

Continuing, the Report of the Senate Committee says (Page C-24): "Section 9 (c) (3): This amendment prevents the Board from holding elections more often than once a year . . ."

This section relied upon by the Board, only pro-

hibits the holding of an election where one has been held in the preceding twelve months. In the case at bar, no election has ever been held. Arbitrarily the Board has refused a determination, through an election conducted by its own agencies, of the representative status of the Union.

The House Labor Committee Report (Page D-2) (The New Labor Law—BNA) on provisions of the bill which were retained in substance substantiate the view expressed in the Senate Report that an election could and should be obtained:

"Section 9 (c) — This sets forth the procedure by which employers, employees, and representatives may obtain elections in which employees may determine whether or not they wish a representative to act as their exclusive representative, and, if so, which one . . .

B. Employer may ask for elections, but only after a representative has claimed collective bargaining rights. . . . The present Board's regulations permit employers to ask for elections, but only when two or more unions demand bargaining rights. This condition will no longer apply."

The opponents of this legislation recognized in the bill the provisions which would *require* the processing of a petition for decertification where no election had been held in the preceding twelve months: (Cong. Record, 80th Cong. 1st Session, p. 4153, 4/25/47; — page E(4) 2. — The New Labor Law — BNA).

Mr. Murray: "Section 9 (c) (1) (A) (11) of the bill would allow a peition for an election to be filed by employees who assert that 'the individual or labor organization which has been certified or is being currently recognized as the bargaining representative is no

longer a representative as defined in Section 9 (a). Such a petition would be purely negative, filed by persons who do not want a collective bargaining representative. The encouragement of collective bargaining and the maintenance of stable relationships already established would be seriously impeded if the above provisions were enacted into law. Under the guise of protecting the freeedom of workers, the section would furnish employers with a useful device for undermining the position of the baragining agent and for delaying collective bargaining. By encouraging dissident groups to file petitions, *the employer can repeatedly bring into issue* the majority status of the bargaining representatives. . . . A year could very easily elapse, therefore, *between the election and the consummation of the bargaining negotiations by a contract.* At this point, a group of dissident employees, with or without the encouragement of the employer, might demand a new election under this provision."

The early decisions from many of the Courts recognized the injustices which would be created in a change of conditions and a change of opinion of the employees. Even under the old law the Courts sought to give relief under such circumstances.

In an early case, *National Labor Relations Board Vs. Remington Rand*, 94 Fed. (2d), 862, decided Feb. 14, 1938, Judge Learned Hand recognized the difficulties inherent in a situation where conditions and employees had changed. Under that law the issue could be resolved only when a new ocassion for negotiations arose and the Union demanded renewed recognition as bargaining agent. It was held the employer should challenge the power of the Union and must invoke an inquiry of the Board if it did not bargain with the Union. "*If it does so* (invoke the inquiry), *we shall not*